VOL. II. No. 4. OCTOBER, 1916

# The American Bar Association Journal

ISSUED QUARTERLY

BY THE AMERICAN BAR ASSOCIATION

## CONTENTS



OFFICE OF PUBLICATION

1416 Munsey Building, No. 7 North Calvert Street, Baltimore, Md.

THE LORD BALTIMORE PRESS: PRINTERS

**Price, 75 cents a copy**

# The American Bar Association Journal

VOL. II OCTOBER, 1916 No. 4


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1916–1917.

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| | JAMES W. REMICK | Concord. |
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GEORGE BRYAN .....Richmond.
R. H. T. ADAMS, JR.....Lynchburg.
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BENJAMIN M. AUSHERMAN..Evanston.
WILLIAM L. SIMPSON.....Cody.

## IV.

## ANNOUNCEMENTS.

The annual meeting of the Association was held in Chicago, Ill., August 30, 31, September 1, 1916. The members and delegates registered numbered 940. There were 525 members and guests in attendance at the dinner.

The following Canadian guests were present at the meeting:

Sir James Aikins, Winnipeg.
R. B. Bennett, Calgary.
John E. Farewell, Whitby.
J. E. A. Macleod, Calgary.
R. C. McMichael, Montreal.
J. H. Rodd, Windsor.
H. P. O. Savary, Calgary.
E. Fabre Surveyer, Montreal.

At the recent meeting of the Association 537 new members were elected; this brings the total membership to more than 10,500.

Upon the report of the Committee on Uniform State Laws, the Association adopted, at the meeting at Chicago, a resolution approving the following acts prepared by the National Conference of Commissioners on Uniform State Laws, and recommended for adoption by the various states:

The Uniform Land Registration Act (Torrens Act).

The Uniform Probate of Wills Act.

The Vice-President and Member of the General Council from each state will please note the above recommendations by the Association, and will endeavor, in accordance with By-Law XII of the Constitution, to procure the enactment by their legislature of the two acts approved by the Association. Drafts of the acts will be found in the July JOURNAL, pages 669-707; additional copies may be had on application to the Secretary.

The Secretary will be glad to receive from all State and Local Bar Associations any items of general interest to the profession

for insertion in the JOURNAL and to submit the same to the Committee on Publications; he will also be glad to insert in the JOURNAL announcements of the date and place of meeting of State and Local Bar Associations.

The Canons of Ethics of the American Bar Association will be furnished free of cost on application to the Secretary.

## PRESIDENT ROOT'S ADDRESS.

The Secretary has on hand copies of the address, "Public Service by the Bar," delivered by Elihu Root as President of the American Bar Association at Chicago, August 30, 1916, which the Secretary will be glad to send to members of the Association upon application.

## EXECUTIVE COMMITTEE.

The Executive Committee of the American Bar Association will meet on Saturday, January 5, 1917, in Philadelphia, Pa.

## CORRECTION.

In the last report (July, 1916, JOURNAL, pp. 550-579) of the Committee on Professional Ethics it was erroneously stated (p. 556) that the Canons of Ethics of which copies are displayed upon the walls of all Court Houses in Alabama are those of the American Bar Association. The Chairman was so informed by a correspondent, but is now advised that they are the Canons of the Alabama State Bar Association, which were in large degree the basis for those of the American Bar Association.

## REQUEST TO MEMBERS.

Members of the Association are requested to advise the Secretary immediately of any change in address; this will insure delivery of all mail matter.

## REQUEST TO VICE-PRESIDENTS.

Vice-Presidents are requested to notify the Secretary promptly of the death of any member of the Association from their respec-

tive states; the Secretary has no other source of information, except the Postoffice Department, and desires for the sake of absolute accuracy to get authentic information.

## BINDING THE JOURNAL.

The Lord Baltimore Press is prepared to bind THE AMERICAN BAR ASSOCIATION JOURNAL in uniform binding at a cost of $1.50 per volume. In color and style the binding will be similar to that of the Annual Reports. Members desiring to have the four numbers of the 1916 JOURNAL bound in one volume, will please communicate directly with The Lord Baltimore Press, Greenmount Avenue and Oliver Street, Baltimore, Md.

## BOOKS RECEIVED.

Acknowledgment is made of the receipt by the Secretary of the following books:

Annual Report, 1916, State Bar Association of Connecticut.

Proceedings Kentucky State Bar Association, 1916.

Report of Mississippi State Bar Association, Vol. XI, 1916.

The Evolution of Governments and Laws (Stephen H. Allen).

Proceedings of the Grand Lodge of Iowa, A. F. & A. M., 1916.

United States Life Tables, 1910. Department of Commerce.

Year Book, 1916, Carnegie Endowment for International Peace.

Year Book, 1916, New York County Lawyers' Association.

## MEETINGS OF STATE BAR ASSOCIATIONS.

The annual meeting of the MASSACHUSETTS BAR ASSOCIATION will be held Friday and Saturday, October 13 and 14, 1916.

THE STATE BAR ASSOCIATION OF WEST VIRGINIA will hold its next meeting in Bluefield, December 28 and 29, 1916.

THE OREGON BAR ASSOCIATION will hold its next annual meeting in Portland, Tuesday and Wednesday, November 21, 22, 1916.

The biennial meeting of the MAINE STATE BAR ASSOCIATION will be held in Augusta on Wednesday, January 10, 1917.

THE NEW YORK STATE BAR ASSOCIATION will hold its next annual meeting on January 12 and 13, 1917, in Brooklyn.

THE BAR ASSOCIATION OF THE STATE OF KANSAS will meet in Topeka, January 30-31, 1917.

The annual meeting of the BAR ASSOCIATION OF CONNECTICUT will be held in Hartford in January, 1917.

The twelfth annual meeting of the MISSISSIPPI STATE BAR ASSOCIATION will be held at Greenville on Wednesday, May 2, 1917.

## LIBRARY OF THE ASSOCIATION OF THE BAR OF BUENOS AIRES, ARGENTINA.

The Bar of the city of Buenos Aires, Argentina, has recently formed an association under the name of El Colegio de Abogados de la Ciudad de Buenos Aires. The association has inaugurated, in the Palacio de Justicia, which houses the courts of the city, a library for the free use, not only of members, but of all engaged in the administration of justice, and of the profession at large. The attention of members of the American Bar Association is called to a request recently made by Dr. Oscar Rodriguez Sarachaga, the director of the library, for copies of publications which may be issued by friends of the library. It is suggested that works issued in this country on constitutional law, public service and corporations, would be especially helpful. They should be sent to Dr. O. Rodriguez Sarachaga, Biblioteca del Colegio de Abogados, Palacio de Justicia, Buenos Aires, Argentina.

## STEPHEN S. GREGORY.

Stephen S. Gregory, of Chicago, Illinois, a former President of the Association, who was seriously ill at the time of the recent annual meeting, has now sufficiently recovered to resume his professional duties.

## V.

## ADDRESSES DELIVERED AT THE ANNUAL MEETING.

### ADDRESS OF THE PRESIDENT.

ELIHU ROOT,
OF NEW YORK.

#### PUBLIC SERVICE BY THE BAR.

One of the most striking effects of the great war is the extraordinary increase of national efficiency which has followed the spur of necessity. All over Europe among the struggling nations the virile and simple virtues have emerged from beneath habits of selfish indifference. Industry, inventive energy, thrift, self-denial, acceptance of discipline, subordination of individual preferences to the general judgment, loyalty to ideals, devotion to country and willingness to make sacrifices for her sake have become general. A new gospel of patriotic service has replaced the cynicism of privilege and personal advantage.

This change relates not merely to military efficiency but to the whole social economy and extends throughout the field of production and to all forms of consumption and waste. It carries a sense of individual responsibility by each citizen to help make his country strong by production and by conservation.

When the war is over we shall find ourselves in a very different world from that which witnessed the Austrian ultimatum to Servia. It will be a world in which the greater part of the nations return to the peaceful competition of production and commerce with a vast increase of power to compete caused by the training of hardship and sacrifice. Plainly, the neutral nations who have neither endured the sufferings nor achieved the rewards of this hard experience may not look with indifference upon these events. They should realize the increased efficiency which they will have to meet when they enter again upon the competition in which all civilized nations must engage. In the amazing developments of these years there are lessons for us to learn which we must not ignore. There are lessons not merely as to submarines and aeroplanes and high explosives,

but as to the whole effective capacity of the nation by which it maintains its place and progress in the world in peace as in war. No human power can withhold the people of the United States from taking part in the international competition which will follow the return of peace. It is not a matter of volition. It cannot be controlled by legislation or by change of parties or by voting. The entire community of civilized nations is going through a phase of development from which no one of them can escape and continue to hold its own, and one of the necessary incidents of that development is competition in production and trade. The United States must therefore be prepared to meet competition carried on more effectively than ever before. The power of organization will be at its highest; the advantages of applied science will be greatest; the hindrances of internal misunderstanding and dissension will be at a minimum.

One of the most important features of the present European development for Americans to consider is the fact that it has been along the line of military organization and discipline. That surrender of individual liberty to superior control which is essential to the discipline and efficiency of an army has been extended to civil life and applied in governmental direction of productive industry, of transportation, and of consumption. The habits of communities accustomed to the least possible control over individual action proved wholly unfit in a sudden emergency to meet the military competition of highly disciplined masses. The question how far the abandonment of individualism and the establishment of rigid government control is to be continued or extended for purposes of efficiency in peaceful competition is of the highest interest and importance to us. This importance is quite independent of the question how far it is probable that we shall be required to defend our wealth and security against aggression by armed force.

In either view it is plainly the duty of all Americans, whatever their calling, to consider by what means they can contribute through either the increase or the conservation of power in their own fields of action, towards the permanent higher efficiency of the people of the United States.

There is no body of citizens to whom this duty should appeal more strongly than to the lawyers, because the subject vitally affects the relations between the individual and the state regulated by law and the fundamental conceptions upon which our system of government is based.

There are two relevant truths of universal application and appeal. One is, that the people of the United States need in one important respect a change of the individual attitude toward their government. Too many of us have been trying to get something out of the country and too few of us have been trying to serve it. Offices, appropriations, personal or class benefits, have been too generally the motive power that has kept the wheels of government moving. Too many of us have forgotten that a government which is to preserve liberty and do justice must have the heart and soul of the people behind it—not mere indifference. Too many of us have forgotten that not only eternal vigilance but eternal effort is the price of liberty. Our minds have been filled with the assertion of our rights and we have thought little of our duties. The chief element of strength which the nations of Europe are acquiring is the spirit of their people, who have learned a new loyalty of devotion and sacrifice for their country. In a world where that spirit prevails the United States will slip back in the race unless we, too, have a new birth of loyalty and devotion.

The second general truth is, that national strength requires the spirit of solidarity among the people of the nation. Sectional or class misunderstanding and hatred or dislike are elements of vital weakness. To be strong a nation's citizenship must be a title to friendship and kindly interest among all her citizens. In a strong nation her people will be one for all and all for one. Every part of a country grows stronger with the prosperity of every other part. National wealth and prosperity are made up of the wealth and prosperity of individuals, and we cannot pull down each other without suffering as a people. The rights and privileges, the property and liberty and life of every American, whether he be at home or in Mexico or in the Far East, on land or sea, are our concern and the concern of each of us. Prosperity to him is a benefit to us; misfortune to him is a loss to us; and

it is vital to each one of us that we shall have such a country and such a government as shall put power and prestige and honor and active interest and inflexible resolution into the protection of every American whose necessities may come by circumstances to demand the performance of his nation's duty. Whenever a part of a people give themselves up to envy and jealousy of another part that may seem more prosperous, whenever a part of a people seek to equalize conditions by pulling down rather than by building up, the power of the nation begins to wane and the forces which should make the nation great and effective are impaired and wasted by internal controversy and diminished patriotism.

When we turn to the particular field occupied by our profession we cannot fail to see that our country would be made stronger if we could change some characteristics in our administration of the law.

There is great economic waste in the administration of the law viewed from the standpoint of the nation and of the states. There is unnecessary expenditure of wealth and of effective working power, in the performance of this particular function of organized society. We spend vast sums in building and maintaining court houses and public offices and in paying judges, clerks, criers, marshals, sheriffs, messengers, jurors, and all the great army of men whose service is necessary for the machinery of justice, and the product is disproportionate to the plant and the working force. There is no country in the world in which the doing of justice is burdened by such heavy overhead charges or in which so great a force is maintained for a given amount of litigation. The delays of litigation, the badly adjusted machinery, and the technicalities of procedure cause enormous waste of time on the part of witnesses and jury panels and parties. The ease with which admission to the Bar is secured in many jurisdictions and the attraction of a career which affords a living without manual labor has crowded the Bar with more lawyers than are necessary to do the business. Of the 114,000 lawyers in the United States according to the census of 1910, a very considerable part are not needed for the due administration of justice. If that business were conducted like the business

of any great industrial or transportation company which is striving for the highest efficiency at the least cost in order to compete successfully with its rivals, a very considerable percentage of the 114,000 would be discharged. We at the Bar are not producers. We perform indeed a necessary service for the community; and to the extent of that necessary service we contribute towards the production of all wealth and the effectiveness of all energy in the community, and we take toll, rightly, from all the property and business in the community for the service. Superfluous lawyers, however, beyond the number necessary to do the law business of the country, are mere pensioners and drags upon the community and upon all sound economic principles ought to be set to some other useful work. There is plenty of work for them to do on the farms of the country.

Why is it that these defects exist in American administration of justice? The American people are not quarrelsome or litigious. They are good natured, practical, simple and direct in their methods of transacting their individual business, respecters of law, and honest in their dealings. Our Bar as a whole is courageous, loyal, and able. Our judges as a whole are just, high minded, and competent. Why do we transact the business of administering justice in such an unbusinesslike way? It is not difficult to point out particular laws and methods which are defective and to say that they ought to be changed; but there is still the question, how did they become defective, and why, after all our experience, do they continue defective?

I think the underlying cause of this defective administration of justice is that the Bar and the people of the country generally, proceed upon a false assumption as to their true relation to judicial proceedings. Unconsciously, we all treat the business of administering justice as something to be done for private benefit instead of treating it primarily as something to be done for the public service. The administration of law is affected by that same general attitude which I have mentioned, in which citizens think about what they are going to get out of their country instead of thinking of what they can contribute to their country. Our political system makes such an attitude on the part of the Bar very natural and easy. With our highly developed indi-

vidualism, our respect for the sanctity of individual rights, our conception of government as designed to secure those rights, it is quite natural that lawyers employed to assert the rights of individual clients and loyally devoted to their clients' interest should acquire a habit of mind in which they think chiefly of the individual view of judicial procedure, and seldom of the public view of the same procedure. It is natural that the same habit of thought should be carried into our legislatures by the lawyers who make up the greater part of those bodies; and with our governments of narrow and strictly limited powers it is natural that there should be a continual pressure in the direction of promoting individual rights and privileges and opportunities and very little pressure to maintain the community's rights against the individual and to insist upon the individual's duties to the community. There are indeed two groups of men who consider the interests of the community. They are the teachers in the principal law schools and the judges on the Bench. With loyalty and sincere devotion they defend the public right to effective service; but against them is continually pressing the tendency of the Bar and the legislatures and, in a great degree of the public, towards the exclusively individual view.

The public tendency is exhibited at the very beginning of the whole business in permitting admissions to the Bar without adequate education and training. Few ideas have been more persistent throughout this country than the idea that the prevailing consideration in determining admission to the Bar should be that every young man is entitled to his chance to be a lawyer and that all requirements of attendance in offices and law schools and for difficult examinations are so many obstacles in the way of liberty and opportunity, defenses of aristocratic privilege and derogations from democratic right. The law schools have been slowly winning their way along the lines of better training for the Bar, but the progress is very slow and the pressure for brief and easy ways to get a license to practice is continuous. Only last year the Massachusetts legislature, by statute, reduced the requirements of school attendance for admission to the Bar to two years of evening high school, following upon an agitation carried on in support of the principle, "Let every man have

his chance." One of our states, and a very great state indeed, with a very high average of general cultivation, permits any one of good moral character to practice law. Correspondence schools of law flourish, proceeding upon the idea that a man can become a lawyer incidentally by reading law books in spare hours as he goes along with his ordinary occupation. The constant pressure of democratic assertion of individual rights is always towards reducing the difficulty of Bar examinations. One consequence is the excess of lawyers that I have mentioned. Another consequence is that the efficiency of our courts is reduced, their rate of progress retarded, the expense increased, their procedure muddled and involved by an appreciable proportion of untrained and incompetent practitioners; by badly drawn, confused, obscure papers difficult to understand; by interlocutory proceedings which never ought to have been taken and proceedings rightly taken in the wrong way and inadequately presented; by vague and haphazard ideas as to rights and remedies; by ignorance of the principles upon which our law of evidence is based; by ignorance of what has been decided and what is open to argument; by waste of time with worthless evidence and useless dispute in the trial of causes; by superfluous motions and arguments and appeals; and by the correction of errors caused by the blunders of attorneys and counsel. In many jurisdictions there is a considerable percentage of the Bar whose practice causes the courts double time and labor because the practitioner is not properly trained to use the machinery furnished by the public for the protection of his clients. In the meantime other litigation waits and the public pays the expense. There is another evil arising from defective education. These half-trained practitioners have had little or no opportunity to become imbued with the true spirit of the profession. That is not the spirit of mere controversy, of mere gain, of mere individual success. To the student of the law, there come from Hortensius and Cicero, and Malesherbes and De Seze, and Erskine and Adams, from all the glorious history of the profession of advocacy, great traditions and ethical ideals and lofty conceptions of the honor and dignity of the profession, of courage and loyalty for the maintenance of the law and the liberty that it guards. It is to a Bar

inspired by these traditions, imbued with this spirit, not commercialized, not playing a sordid game, not cunning and subtle and technical or seeking unfair advantage—a Bar jealous of the honor of the profession and proud of its high calling for the maintenance of justice—that we must look for the effective administration of the law. The old customs under which the young law student was really guided and instructed in the law office of the established practitioner, under which the youth was impressed by the example and spirit and learning of his senior, are rapidly passing away. In the greater part of the country these customs no longer continue. The law school has taken the place of the law office except for acquiring the mere technique of practice, and the rights of the people of the United States to have an effective administration of the law require that the standards of the best law schools shall be applied to determine the right to membership in the Bar. When we compare our own method with the test of the three years' probation of the French Licentiate and the arduous four years' training of the German Referendar we may realize how little the American people have had in mind the protection and promotion of the public interest in requiring competency at the Bar.

No one can help sympathizing with the idea that every ambitious young American should have an opportunity to win fame and fortune. But that should not be the controlling consideration here. The controlling consideration should be the public service, and the right to win the rewards of the profession should be conditioned upon fitness to render the public service. No incompetent sailor is entitled to command a public ship; no incompetent engineer is entitled to construct a public work; no untrained lawyer is entitled to impair the efficiency of the great and costly machinery which the people of the country provide, not for the benefit of lawyers but for the administration of the law.

The same failure to realize that the Bar has public duties as well as privileges has affected the relations which American legislation has sought to establish between the Bar and the Bench in the conduct of the business of the courts. In the hearing and decision of causes in all their stages the judge represents

the public interest; the lawyers in the case represent primarily their particular clients. It is the function of the judge to promote the will of the sovereign people that justice be done to all parties before him; to see to it that the facts are really ascertained; that the law is honestly applied; that unfair advantage is not taken; that witnesses are protected against improper treatment; that the public time is not wasted. On the other hand, it is the business of the lawyer to conduct a case so that his client will win. His relations to the case tend to give him a one-sided view of what is just and fair in that case. The ardor and stress of conflict are not favorable to abstract considerations of justice. He is concerned in exhibiting the facts which will help his client; in stating the law upon which his own side relies; in breaking down witnesses against him and strengthening witnesses in his favor. On each side counsel plays the game for all that it is worth and sometimes superiority of counsel outweighs superiority of merit. Doubtless this contention, this struggle between the opposing sides of the case, is the best possible way in the long run to reach just results. But it is plain that in all the transaction the representative of public justice is the judge on the bench and that there is necessarily between him and the counsel on each side always a certain antagonism and contention. The natural tendencies of the American people emphasize this antagonism. We are restive under authority. We do not yield readily to discipline. We are unwilling to accept defeat. In every game we exaggerate the importance of success in comparison with all the rest of life. The restiveness of the Bar under the control of the judge on the bench finds its expression very widely in our legislation regarding procedure. That legislation is of course framed by the lawyers in our legislatures, and unconsciously, doubtless, their natural attitude of antagonism has led to a great multitude of provisions designed to protect the Bar against interference from the Bench.

The most striking illustration of this tendency is presented by the provisions found in many states, and quite recently urged upon Congress, prohibiting the judge from expressing any opinion to the jury upon questions of fact. From time immemorial it has been the duty of the court to instruct juries as to the law

and advise them as to the facts. Why is it that by express statutory provision the only advice, the only clarifying opinion and explanation regarding the facts which stands any possible chance to be unprejudiced and fair in the trial of a cause, is excluded from the hearing of the jury? It is to make it certain that the individual advantage gained by having the more skillful lawyer shall not be taken away. It represents the individual's right to win if he can and negatives the public right to have justice done. It is to make litigation a mere sporting contest between lawyers and to prevent the referee from interfering in the game. The fact that such provisions can be established and maintained exhibits a democracy's tendency to yield support to the human interest of the individual as against the exercise of even its own power by its own representatives and for its own highest purposes.

Under the influence of the same disposition a large part of the detailed and specific legislative provisions regulating practice are really designed to enable law business to be carried on without calling for the exercise of discretion on the part of the court, and the evil results of the absurdly technical procedure which obtains in many states really come from intolerance of judicial control over the business of the courts. A clearer recognition of the old idea that the state itself has an interest in judicial procedure for the promotion of justice, and a more complete and unrestricted control by the court over its own procedure would tend greatly to make the administration of justice more prompt, inexpensive and effective; and this recognition must come from the Bar itself.

The present condition of our law presents very strong reasons why lawyers should awake to a sense of responsibility for another and still more serious service which will require a Bar made strong by the application of stringent tests for admission, and by the best work of the best law schools in its training. The vast and continually increasing mass of reported decisions which afford authorities on almost every side of almost every question admonish us that by the mere following of precedent we should soon have no system of law at all, but the rule of the Turkish cadi who is expected to do in each case what seems to him to be right; and then the door would be thrown wide open for the rule

of men rather than the rule of law, and for the exercise of personal injustice as well as personal justice. We are approaching a point where we shall run into confusion unless we adopt the simple and natural course of avoiding confusion by classification, system, the understanding and application of generally recognized and accepted legal principles. The slow development of the common law with its rich product of legal ideas and remedies has followed the lines of legal principles; but at all times the application of legal principles has been conditioned upon the customs from which the law has been evolved and to which the rules established have been applied. It is no slight task for discriminating intelligence to distinguish the principles which have been applied from the incidents of their application, arising from the social and industrial and political conditions of the day, involved in the multitude of reported cases that record the progress of the common law. Yet it is continually more important that the Bar at large shall be trained to see through the precedents and the incidents to the controlling principles. A few men are already taking the lead in the work of classification—some, great teachers; some, great judges; some, great practitioners. But these few play only a small part in administering the law. Thousands of judges and tens of thousands of lawyers in all the cities and villages of this great country are doing that, and the problem of classifying and simplifying our law involves the need to carry to the great mass of them, present and future, a comprehension and discriminating understanding of the legal principles which form the thread of Ariadne for guidance through the labyrinth of decisions. How can that be done? Not by writing text books; the book stores swarm with them already. Not by preaching reform; nobody listens. Not by the imposition of a system to be accepted, as Continental Europe accepted the Roman law. No such system would be accepted. It would be ignored. All our instincts are against it. Some very able and public spirited lawyers have been for some years urging the organization of a definite and specific movement for the restatement of our law; for a new American Corpus Juris Civilis. They are quite right. It ought to be done. But who is to do it and how shall he be recognized as a prophet? Can we elect him by pop-

ular vote? Can we select him upon our own acquaintance with men of genius and self-devotion? No. Such a man or such a group of men must be the product of natural selection. They must be evolved by the conditions of life, and they must speak to an audience prepared to listen.

The only way to clarify and simplify our law as a whole is to reach the lawyer in the making and mold his habits of thought by adequate instruction and training so that when he comes to the Bar he will have learned to think not merely in terms of law but in terms of jurisprudence. The living principle of the case system of instruction in our law schools is that the student is required by a truly scientific method of induction to extract the principle from the decision and to continually state and restate for himself a system of law evolved from its history. He is thus preparing not merely to accept formally dogmatic statements of principles but to receive and assimilate and make his own the systematic thought and learning of the world in the science of jurisprudence. With a Bar subjected generally to that process of instruction, the more general systematic study of jurisprudence would follow naturally and inevitably, and the influence of that study would be universal; and from that condition would evolve naturally the systematic restatement of our law, by men equal to that great work. Pour sand slowly upon the level ground; the conical pile produced will have a fixed relation between the area of its base and the height of the cone. It is so with human society. We must broaden knowledge and spirit to build up and we must build up to broaden.

To deal with American law as it is, however, is but half the problem. We are in the midst of a process of rapid change in the conditions to which the principles of law are to be applied, and if we are to have a consistent system that change must be met not at haphazard but by constructive development. The industrial and social changes of our time have been too swift for slowly forming custom. Old rules, applied to new conditions never dreamed of when the rules were stated, prove inadequate too suddenly for the courts readily to overtake them with application of the principles out of which the rules grew. We have only just begun to realize the transformation in industrial and

social conditions produced by the wonderful inventions and discoveries of the past century. The vast increase of wealth resulting from the increased power of production is still in the first stages of the inevitable processes of distribution. The power of organization for the application of capital and labor in the broadest sense to production and commerce has materially changed the practical effect of the system of free contract to the protection of which our law has been largely addressed. The interdependence of modern life, extending not merely to the massed city community but to the farm and mine and isolated factory, which depend for their markets and their supplies upon far distant regions and upon complicated processes of transportation and exchange, has deprived the individual largely of his power of self-protection, and has opened new avenues through which, by means unknown to the ancient law, fatal injuries may be inflicted upon his rights, his property, his health, his liberty of action, his life itself. We have not yet worked out the *formulae* through which old principles are to be applied to these new conditions—the new forms perhaps through which the law shall continue to render its accustomed service to society. The arrival of new conditions to which the law must be adapted has its counter part in the desuetude of old customs and the disappearance of the basis for old rules. The process of change in a nation's standards of conduct in life, which has made the Blue Laws of Connecticut a familiar evidence that laws once vigorous may die a natural death without repeal, is always going on. It is a part of the method by which the common law has developed. But that process seems to have been much accelerated in recent years. Take for example the community's standard of conduct as applied to the domestic relations, the change in the customary rights and duties recognized between parents and children, masters and servants, husbands and wives, the general relation between the sexes, which apparently is about to receive a new impulse towards change from the extension of women's work in Europe owing to the war.

These rapid changes of conditions to which the law has to be adapted furnish the chief reason why we are bombarded by such a multitude of statutes, good, bad, and indifferent, seeking to ac-

complish changes by express prohibitions, commands, and statutory remedies. This mass of statutes proceeds from natural impulses to hasten the development of the law in its application to conditions which move too rapidly for customs to form. Many of them will be futile, many will be abandoned, many will be modified, many will prove to be valuable contributions to the development of the law, many will prove to have been steps in the wrong direction and to retard development. Taken altogether, they are themselves making customs from which the law of the future is being evolved.

Doubtless a large part of the irritation and prejudice against the courts in recent years has been due to the misunderstanding of those who in their impatience set the courts down as opposed to progress because they themselves do not realize that there has been a progressive development of our law to meet the new conditions, but that by the nature of the institution such development must follow and not precede the public conviction of its necessity.

There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As any community passes from simple to complex conditions the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority. The necessities of our situation have already led to an extensive employment of that method. The Interstate Commerce Commission, the state public service commissions, the Federal Trade Commission, the powers of the Federal Reserve Board, the health departments of the states, and many other supervisory offices and agencies are familiar illustrations. Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because

such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation. Yet the powers that are committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be developed, and that with us is still in its infancy, crude and imperfect.

The development of our law under the conditions which I have pointed out will be accompanied by many possibilities of injurious error. There will be danger that progress will be diverted in one direction and another from lines really responsive to the needs of the people, really growing out of their life and adapted to their character and the genius of their institutions, and will be attempted along the lines of theory devised by fertile and ingenious minds for speedy reforms. Ardent spirits, awakened by circumstances to the recognition of abuses, under the influence of praiseworthy feeling, often desire to impose upon the community their own more advanced and perfect views for the conduct of life. The rapidity of change which characterizes our time is provocative of such proposals. The tremendous power of legislation, which is exercised so freely and with little consideration in our legislative bodies, lends itself readily to the accomplishment of such purposes. Sometimes such plans are of the highest value. More frequently they are worthless and lead to wasted effort and abandonment. The test of their value is not to be found in the perfection of reason. Man is not a logical animal, and that is especially true of the people of the United States and the people of Great Britain, from whom our methods of thought and procedure were derived. The natural course for the development of our law and institutions does not follow the line of pure reason or the demands of scientific method. It is determined by the impulses, the immediate needs,

the sympathies and passions, the idealism and selfishness, of all the vast multitude who are really from day to day building up their own law. No matter what legislatures and congresses and publicists and judges may do, the people are making their own law today as truly as in the earlier periods of the growth of the common law. No statute can ever long impose a law upon them which they do not assimilate. Whether repealed or not, it will be rejected and become a dead letter. No decision that is inconsistent with their growth can long resist the pressure to distinguish and overrule. What can be done, what must be done to make true and uninterrupted progress is that those members of the democracy to whom opportunity has brought instruction in the dynamics of law and self-government, shall so lead and direct the methods of development as to respond to the noblest impulses, the highest purposes, the most practical idealism, of this great law-making multitude, so that the growth of the law shall receive its impetus from the best and not from the worst forces of the community, and be guided by the wisdom and not the folly, the virtues and not the vices, of the people.

There will always be danger of seeking lines of law development which appear upon the surface to be progress but which are really an abandonment of progress. Long continued advance in this world in any useful direction is difficult and slow. Progress in self-government requires the self-governing people to apply rules of action to their own conduct; to limit themselves by self-denying ordinances; to restrain their own impulses and cure their own faults. There must be many shortcomings in such an effort. It is a hard road to travel, and wearisome, and success must be long deferred. Human nature turns readily to any proposal of swift and easy reform which may relieve it of the burdensome task of self-control by the exercise of compulsion on some one else. That is not reform; it is surrender. Infinite harm may be done by such attempts and long wanderings and confusion of effort may ensue; but if the people are to go on with the development of their free self-government they must ultimately come back to take up themselves the burden which they have sought to escape.

There will always be danger of developing our law along lines which will break down the carefully adjusted distribution

of powers between the national and the state government. Upon the preservation of that balance, not necessarily in detail but in substance, depends, upon the one hand, the maintenance of our national power and, on the other hand, the preservation of that local self-government which in so vast a country is essential to real liberty. There is a continual tendency to restrict the exercise of national authority wherever it interferes with the local convenience or interest of a particular state or group of states; and, on the other hand, there is an equally persistent tendency to call in the exercise of national power to perform the duties of local government where states lack effectively organized power or wish to be spared expense or see an opportunity to get money out of the national treasury for local use, or where some portions of the country wish to impose their ideas on the remainder of the country. The same states that are unwilling to give the national judiciary jurisdiction to enforce the protection of aliens promised in national treaties or to permit a national force of citizen soldiery to be commanded by officers appointed by the national executive instead of militia officers appointed by the governors of the states, will urge Congress to pass sumptuary laws controlling the private life and conduct of affairs in local communities and will hand over to the national government strictly local regulations for the sake of an appropriation. Powers thus conferred under special motives and for special purposes do not revert. They are continued. And if the process goes on our local governments will grow weaker and the central government stronger in control of local affairs until local government is dominated from Washington by the votes of distant majorities indifferent to local customs and needs. When that time comes the freedom of adjustment which preserves both national power and local liberty in our system, will be destroyed and the breaking up of the union will inevitably follow.

More critical still is the danger of too great a reaction from the system of free contract upon which our government has long been developing—a reaction which will destroy the basis of individual liberty upon which our institutions rest. We are in the midst of a reaction now. It was inevitable. The individualism which was the formula of reform in the early nineteenth cen-

tury was democracy's reaction against the law and custom that made the status to which men were born the controlling factor in their lives. It was an assertion of each freeman's right to order his own life according to his own pleasure and power, unrestrained by those class limitations which had long determined individual status. The instrument through which democracy was to exercise its newly asserted power was freedom of individual contract, and the method by which the world's work was to be carried on in lieu of class subjection and class domination was to be the give and take of industrial demand and supply. Now, however, the power of organization has massed both capital and labor in such vast operations that in many directions, affecting great bodies of people, the right of contract can no longer be at once individual and free. In the great massed industries the free give and take of industrial demand and supply does not apply to the individual. Nor does the right of free contract protect the individual under those conditions of complicated interdependence which make so large a part of the community dependent for their food, their clothing, their health and means of continuing life itself, upon the service of a multitude of people with whom they have no direct relations whatever, contract or otherwise. Accordingly, democracy turns again to government to furnish by law the protection which the individual can no longer secure through his freedom of contract and to compel the vast multitude on whose co-operation all of us are dependent to do their necessary part in the life of the community. Plainly, in some directions and to some extent such governmental control is necessary; but we should not forget that every increase of governmental power to control the conduct of life is to some extent a surrender of individual freedom and a step backwards towards that social condition in which men's lives are determined by status rather than by their own free will. We should be careful that in promoting the efficiency of government we do it by the just application and not by the surrender of the true principles upon which our government is founded. Let me state the case in its simplest terms: The central principle of our system of government is in the proposition that every man has a right to full and complete individual liberty, limited only by the

equal liberty of every other man. From that right all others are deduced; the right to life, to property, to the pursuit of happiness, are its corollaries. Our whole system of law is in its essence only the enforcement of the reciprocal limitations of individual liberty. It is a compulsion upon me to limit my liberty by yours and upon you to limit your liberty by mine. The justification of all laws and customs which constrain human conduct is that they are necessary and appropriate for the preservation of the liberty of others. Whatever law passes beyond that limit and seeks to impose upon the individual the ideas of others as to what his conduct should be, whether to subserve the interests of others or to conform to their prejudices or to their ideas of propriety or wisdom, even though those others may constitute an overwhelming majority of the whole community, is a violation of the principles upon which our government was formed; is not the just exercise of governmental power, but is essential tyranny. The test is difficult of application. The incidence and the ultimate effect of law are often indirect and obscure. They depend upon a multitude of conditions imperfectly known and subject to controversy. The highest intelligence and the broadest knowledge are needed for the application of the test; but upon a sincere and unremitting effort that it shall be applied in every step of the development of our law depends the question whether that development shall destroy or shall deepen and strengthen the foundations of our free government.

What part is the Bar to play in this great work of the coming years? Can we satisfy our patriotism and be content with our service to our country by devoting all our learning and experience and knowledge of the working of the law and of our institutions solely to the benefit of individual clients in particular cases? During all our mature lives, in many courts and upon many occasions we have been asserting rights, protecting property, preserving liberty, by appeals to the law, to the great rules of right conduct written into our constitutions; protesting against the abuse of official power, extolling justice, pleading for loyalty to our free institutions. Haven't we meant it? Has it all been mere talk for the purpose of winning cases? Have we never really cared about law and justice except as available instruments

to get particular clients out of trouble? Is the Bar doing its duty and playing its part in the development of the law? As a rule the leaders of the Bar devote themselves to their individual practice. As a rule the younger and least experienced lawyers make up the state legislatures. There are exceptions, but that is the rule. Even in the National Congress, although the average of ability and strength is much higher than the public seems to suppose, comparatively few lawyers of the first order make their appearance. The questions involved in the development of the law are seldom adapted to interest an audience in political discussion. The real consideration and discussion and the mature conclusions worthy to be followed must be among the practitioners, the judges, the teachers of the law. The fitness of a people for self-government is measured by their capacity to set up and maintain institutions through which government can be carried on effectively, and responsibly. That rule applies to all large bodies of free agents having a common purpose. It applies to the 114,000 lawyers of the United States. We must have institutions through which our duty can be done if it is to be done. In response to that necessity came the associations of the Bar—the six hundred local and state associations and this great national organization. Here is at hand an institution for the public service of the profession of the law. To enlarge its membership, to improve its procedure, to increase its scope and efficacy, to strengthen its authority and its appeal in the real life of our time—these are steps by which the lawyers of all the states may rise to the high level of patriotic duty and a dignity of service worthy of a true American Bar.

## DEMOCRACY AND LAW.

BY

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While democracy offers the greatest opportunity to the individual citizen it puts upon him the greatest responsibility. Its very essence being a revolt against arbitrary imposition, its essential basis is law.

In other forms there are the government and the people, those who govern and those who are governed. In democracy the people are the government and the government are the people, and the governors and governed are indistinguishable.

In other forms of government the responsibility for the conduct of public affairs is assumed by the oligarchy or monarchy and the individual has only his own personal affairs to attend to; in a democracy the public affairs are his as well.

In oligarchies or monarchies the arbitrary will of the rulers regulates and determines the nature, character and extent of government. In democracies this is done by the people themselves. They do this by the constitutional or fundamental law of their being.

If a democracy is to persist there must, therefore, be absolute reverence for the law. It is the very foundation and basis of its existence.

It is imperative that we who are immediately concerned with the study and knowledge of law should pause and consider the present situation of our own experiment in democracy.

Is it the fact that our people reverence law? That they realize the basic principles of their government which must be adhered to and preserved if the government as conceived is to be maintained? That they appreciate the unique and wonderful opportunity which is theirs, and the danger which lies in thoughtless and heedless conduct with respect to it?

In the onrush of life in this New World, with its boundless and unprecedented opportunities for the individual, it is as natural as it is unfortunate that each one is so occupied with his own

personal affairs that he pays little or no attention to vital matters of public concern.

We are so accustomed to accept whatever is, without question or analysis, that it is difficult for us to appreciate that our government is only 134 years old; that two biblical spans of threescore years and ten have not yet been attained by it.

Without a model when created, growing amazingly big with disconcerting suddenness, successful beyond all prophecy, surviving shocks and crises from without and from within and emerging therefrom strengthened instead of weakened, it is natural that we should believe our nation a true child of fortune whose sons need take no heed of the morrow.

It is certainly true that we are taking little or no heed of the morrow. We see upon every hand departure after departure from the essential principles upon which our whole governmental system was based. We observe the strain and stress thus put upon it. We see these things done heedlessly, not only with disregard of the immediate consequences, but entirely oblivious of the fact that such assaults are fundamental, not incidental, in their character; that they strike at the very basis.

Little by little the very foundation stones of the structure are being disintegrated or undermined. The means by which this is being accomplished are so subtle and insidious that few are even aware of the fact, and there not only is no numerous army of defense but the small handful who do utter warnings are unheeded. Their warnings fall upon deaf ears, they are scoffed at as reactionaries, as being wedded to the past, and incapable of appreciating modern ideas and the necessities of progress. The whole popular tendency at the present time is averse to the calm, steady consideration necessary to reach proper conclusions.

If what is taking place were merely the misuse of defined powers or even their abuse, it would be disturbing but not dangerous. If we were merely witnessing a people groping about in the conduct of public affairs under novel conditions, we might deplore the lack of wisdom or of reason shown in various of the results produced, but so long as each public agency confined itself to its appointed sphere and merely misused or failed to properly use the functions entrusted to it there would be no legitimate ground for despair and much legitimate ground for hope.

What is going on is, however, not this, but something very different and very much more dangerous. It is an entire failure to adhere to the law of our being. We are witnessing the departure in radical ways from the fundamental considerations which led to the adoption of our system of government and which distinguishes it from other prior experiments in government—a rending and breaking apart of the constituent elements of the whole structure and a changing of its nature and form; not changing, altering and amending it in accordance with the provisions furnished for that purpose, but despite them. The organic law is left as written, but action directly repugnant to it or violative of it is constantly tolerated and encouraged.

The distressing consideration is that this is not only being done without vigorous and hopeful opposition, but there is scarcely any realization of the fact. There is no political party, no school of thought, no propaganda engaged in bringing the truth home to the people. The few who very occasionally raise their voices in protest against some extreme departure from an essential principle of our system of government are immediately placed under suspicion and the inquiry is almost always as to their motives and not at all with respect to the soundness or value of their contentions. It must be admitted that there is little to encourage those who conceive it their duty to point out the inevitable result of the prevailing tendency. The very fact that humanitarian motives of the most worthy character actuate those who are doing the harm makes it still more difficult to obtain a proper hearing and consideration.

It is difficult to make clear to the popular mind that in opposing the doing of a certain beneficent thing in the way proposed, you are not opposed to that which is sought to be done, but are opposed for proper reasons to the way it is sought to be accomplished. It is difficult to make clear that the preservation of the essential elements of our system of government is of much greater importance than the attainment of some greatly desired reform proposed to be secured at the expense of the integrity of the system. With a reform brought forward as necessary for the public welfare and for the advancement of society, little heed is given to one who refers to such abstruse things as the organic

law or underlying principles of government. One who does so is immediately labelled as a praiser of past times and as non-progressive.

In many instances progress is popularly synonymous with movement and the direction of the movement is not considered worthy of thought. The constitution is too often treated as a mere scrap of paper, and fundamental elements of our system of government are cast upon the scrap heap as obsolete things.

I am not here concerned with the question as to whether the things done are wise or otherwise. I am directly considering whether they should have been done in the way in which they were done, and should continue to be done in like ways. If I am wrong in believing that the whole modern tendency threatens the very integrity of our system of government, then such mistakes as have been made are negligible; but if I am right in thus believing, then there is indeed the gravest matter for consideration. If the modern tendency is to disregard organic law, to depart from the basis upon which our system is based, and to act contrary to the spirit which animated it, then no immediate benefits to be secured by thus proceeding can counterbalance the untoward consequences of such conduct. The question is not initially, therefore, whether the new product is better or worse than that which could be produced by adhering to the law and spirit of our being, but whether the necessity of adhering thereto is not imperative and essential. By so doing reforms would be such in fact as well as in name. The form of the government would be legally and properly changed to give it the desired rights and powers; and thus re-formed would function organically.

Much time and space has been devoted to debate as to the best form of government. Each one has its manifest advantages and obvious disadvantages. Each one has its supporters and opponents. Monarchy, oligarchy, constitutional monarchy, pure democracy and representative democracy, each has virtues and the defects of its virtue. Each, however, is *sui generis* and each differs in essential particulars from the other.

At the time of the conception and birth of our own national government each of these other kinds, excepting representative

democracy, had been given a full and fair trial. From the first there was no thought of any other than a republican form of government—one in which the executives should be chosen by the people themselves. There was much dispute, however, as to the extent and character of the participation of the people; that is, the character of democracy that should be adopted.

The only experiments in pure democracy on any grand scale such as those of Athens and Rome had failed because pure democracy is incapable of government except within a very small and limited area. It is only where the people are in such intimate touch and contact with their public affairs that they are hardly distinguishable from their private affairs, that the people can successfully rule by direct participation in government. The little city of Rome through the exercise of governmental functions by its own citizens attempted to rule the world, and this effort at pure democracy failed, as it was inevitable that it should fail. Determined as the framers of our systems of government were to adopt a republican-democratic system, they wisely discarded any attempt at pure democracy and made definite and absolute provisions for representative government, the only kind which gave any hope of success under the circumstances existing and to exist in this country. Representative government under a written constitution was therefore the very keystone of the arch.

Ours was the first great attempt at a representative democracy thus circumstanced. The choice was consciously and deliberately made. It was an almost inspired decision. It afforded, we firmly believe, the greatest opportunity ever offered mankind to expand and develop individual life under the best possible conditions of private and public welfare.

We are the heirs of this great spiritual and material estate. Ours is the responsibility to maintain it in its essential integrity or to impair it and perhaps waste it. Are we true to this great trust? Are we striving with every ounce of our strength and our intelligence to maintain and preserve the essential bases of our national existence, or are we careless and heedless, letting the popularity of superficial thought and unregulated emotion sweep us from our foundations and land us on quicksand, which has no stability and will sooner or later give way beneath us?

Do we even appreciate the magnificence of the opportunity which is ours? Do we realize that this great experiment in democratic-republican government is the present hope of mankind; that if we are firm of mind and steady of purpose and conserve the system by proper attention to its essential elements we are doing a service of world-wide importance; that the great wave of democracy which is sweeping over the world must contain itself in proper form or it will dash itself away uselessly; that to the extent that we preserve the principles upon which our whole system rests and demonstrate the usefulness to mankind of such government we give strength to the theory of democracy and powerful impetus is added to its proper execution throughout the world of men? And to the extent that we fail, we not only suffer in our own behalf, but we impair the very theory itself and stay the march of progress.

Think how long and toilsome was the journey of man before he attained this ideal and was able to put it in practical form and make it operative for his benefit. Think of the age long periods when the mass of mankind had little in life to differentiate them from the beasts of the field; when man's mind was given nothing to feed upon, and his body only that which would make it useful to bear burdens; when the soul had nothing to satisfy its aspirations, but was atrophied from disuse and had no aspirations. Think of the hard and fast lines drawn about the individual life—confines which could not be passed. And then think how, little by little, by the revolt of mind and of body, by force of intellect and by force of arms, by brawn and by blood, by conflict and by conquest, the mass of mankind broke down the barriers and reached the high ground of boundless opportunity, became conscious of itself and emerged into a vital atmosphere where growth and expansion and aspiration were possible.

When our government was formed the time was ripe for this next great step forward along the line of progress in human government. Oligarchies had by their tyranny bred restlessness of mind and body and revolts had overturned them. Monarchies had by their selfishness and self-aggrandizement so abased their people that the latter had risen and exacted some measures of relief and extorted some concessions for their benefit. Pure de-

mocracy had been tried, had been short-lived and had demonstrated that it was unworkable on any large scale.

That which was left for trial and which gave the greatest chance of success was representative democracy.

Every citizen was made equal before the law. Every citizen was accorded certain inalienable rights.

These essential things were secured to him by the fundamental constitution providing for a federal system and marking out the sphere within which each agency should exercise its functions.

This was the wonderful boon the founders of this Republic furnished to its people. This the unprecedented opportunity afforded them for their own advantage and incidentally for the advantage of the rest of the race of men.

The great contribution, of the constructors of our government, to the science of government was a written constitution securing the humblest and poorest and weakest in his rights equally with the strongest, richest and most powerful—an unrestricted right to all to select their representatives to operate the system—and a court supreme in its power to keep the legislative and executive branches within their appointed and well-defined bounds.

Before this time there had, of course, been executives of various kinds and with various powers. There had been assemblages of the people variously constituted and exercising differing measures of power, and there had been courts with varying jurisdictions and functions, but the executives had either been untrammeled, and therefore inevitably tending to tyranny, or so trammeled and restrained that they were mere marionettes, without initiative or useful function. The assemblages had either been too select or too numerous and had either had too much power or not enough, and similarly the courts had either too much or too little entrusted to them. Never before had there been devised and put into practical operation a system by which the basic elemental, fundamental rights of the citizen were secured by a written constitution providing for an executive whose scope of power was limited by law, but who was left full judgment and discretion within the scope; a legislative body freely chosen by the people and granted full power within the limit permitted to it, and a court to conserve the virtue of the whole system by keeping all the branches of government within their lawful spheres.

One is certainly justified in saying that up to this time no other equally wise, practical and valuable advance in the science of government has been suggested, much less put into practical effect.

No such boundless opportunity for progress and advancement of the happiness, usefulness and worth of the individual has ever before been offered. Nothing affording anything like its possibilities for the benefit of mankind has ever been devised or designed by men.

To us who have it in our charge, it is the very Ark of the Covenant, and if we do not jealously and zealously guard and cherish it, great is our dereliction and disastrous our betrayal of trust.

How have we done up to now, and what are we doing now in this regard?

Starting with the Federal System we find that we have almost completely departed from the underlying basis of the whole structure. We have almost completely wiped out the state lines. The design was an indestructible union of indestructible states. Each was supreme within its appointed sphere and scope. Neither could invade the proper domain of the other without imperiling the controlling principle upon which the system rested.

The term "States' Rights" is entirely misleading since it does not connote the necessary correlations—States' Duties. And similarly the contract reference to the rights of the citizen is mischievous unless at the same time emphasis is laid upon the duties of the citizen.

The spirit animating our system of government rests upon the self-reliant, sturdy citizen taking care of himself and his personal responsibilities; choosing from among his neighbors those who shall represent him in the immediate government of his local civil community; over that, in turn, a larger municipal unit similarly operated by representatives thus chosen, and over all an immediate state government providing for the doing of the collective business of its citizens which the localized community and the individual citizen could not do for himself; over the collective states a federal government to which was granted such powers as would enable it successfully to do those things which the individual states could not otherwise properly do.

Of the very nature of this conception was the citizen glorying in the lack of restraint upon the proper conduct of his own life and proud of the opportunity to do well his part and to bear his full responsibility for himself and his own, taking counsel of himself and those about him to choose his representatives to whom should be entrusted the discretion and direction of public affairs; things which his own preoccupation with his own affairs made it impossible for him to study intelligently and determine wisely. The municipal governments likewise bearing their full responsibility for the public concerns entrusted to their charge—those which most immediately related to the citizen in his daily life; over them the state government with full jurisdiction and responsibility for the collective business which was its concern, the states, in turn, granting to the central federal government such power as should enable it to administer those public affairs that were national in their scope and nature.

Each entity, from the citizen up, conscious not only of its rights, but of its duties. Each worthily measuring up to the full adequacy of its responsibilities. Each ardent to do well and to do fully its duty that the whole might do well.

Little by little for easily observable causes radical changes have taken place and radical departures appear from this initial conception. With the country's growth in numbers and the engrossment of the citizen in his own private affairs, the citizen came to view even his own immediate municipal government as a thing apart from himself—a thing to bestow benefits, not to receive them—a reservoir to be drawn on without need of replenishment so far as he was concerned. He was mainly concerned, so far as government was regarded, with his rights, with an entire omission to consider the co-relative duties. He no longer looked upon his city as something of his own, both with respect to its bestowal of benefits and bearing of burdens, but looked upon it as a thing outside of himself and exclusively responsible for its self-assumed duties.

With respect to his personal affairs the citizen chooses those to whom he entrusts responsibility only after a careful consideration of their qualifications. If he is engaged in matters requiring legal attention he selects his lawyer only after investigation of his

character, his attainments and his standing, and so with his physician, and with the practical man of business to whom he gives a power of attorney. But with respect to his political responsibilities he exercises no such intelligent and careful method. He is well aware, if he stops to consider, that the collective affairs of a large community are infinite and intricate in their character and require careful study, analysis and consideration for their proper direction and determination. He comprehends, if he thinks about the matter, that the proper administration of public affairs calls for character of the highest degree, for intelligence, honesty, perseverance and courage. Curiously enough, when he comes to select his representatives to exercise these essential functions, he discards almost all the consideration which should govern him and makes his choice for partisan reasons, for personal reasons, or for no reason that is worthy of the name. Nor does the citizen pay much heed to the conduct of his official after he has chosen him until some unfortunate situation ensues, when hastily and without proper consideration he revolts and either attempts to understand and decide the question for himself, which is usually impossible, or turns the duty over to another chosen in the same heedless and thoughtless fashion. As an inevitable result the citizen does not secure the services of the character of men to whom should be entrusted these delicate and difficult duties. Little or none of the proper credit is given to the painstaking, conscientious and able public administrator.

"Happy is the country that hath no history," says the proverb, and public officials who go about their duties without self-advertisement and who bring to bear conscience, probity and intelligence and produce the best results receive little or no public recognition. The history of their administration is uneventful and their praises are unsung. Representative government is thus slain at the threshold by the citizen's neglect.

The identical tendency next shows itself, as is natural, in the operation of our civic municipal government. Realizing that the citizen is largely confined in his interest in the affairs of government to the extent to which it personally benefits or costs him, those in charge strive to maintain their popularity by doing those ostentatious things which are conceived to be beneficial and pass on the burden of doing those things which entail cost upon

the individual citizen and which earn his dislike. As a result, these smaller municipal units become supine with respect to many of their duties; and the larger unit, the state, is called upon to perform them. Since representatives in the state governments are chosen in the same haphazard and thoughtless method, they frequently do not find it to their interest to put back upon the local community the duty which it has neglected, but seeks to minimize the apparent burden or to pass it on to the federal government if it is possible for them to do so.

To an extent that is almost inconceivable unless one stops, accurately, to investigate, this process of shrinking from responsibility and passing on of burdens is going on from the individual citizen up to the federal government. Without regard for the moment as to whether express constitutional limitations are violated or not, it is proper to observe that this course of conduct is directly at variance with the fundamental conception of our system as devised, and that whether it results finally in good or in evil, it has one inevitable result which is the alteration beyond recognition of the character of government which we ostensibly maintain.

When the ultimate point has been reached and those duties which have supinely passed from the hands of the states are sought to be cast upon the general government, the prevailing tendency produces similar consequences. The representatives of the people, there in charge, realize that their popularity and continuance in office depends upon the ostensible benefits bestowed by government and that nothing but dislike is engendered by one who raises his voice in opposition. Unconscious as the people are that in the pursuit of immediate benefits they are imperiling the very basis of their governmental structure, it is easy to understand why those immediately responsible take the easiest way. These representatives realize that in the present popular mood they are not selected as true representatives, charged in the highest degree with the responsibility for investigation, decision and courageous direction of public affairs, but are viewed largely as messengers to register the popular will of the moment and to please the popular fancy of the passing day. At the present time there is little or no encouragement for leader-

ship— leadership without which representative government cannot exist. The present tendency has produced a hybrid between pure democracy and representative democracy and has all of the vices of each and none of the virtues of either.

However efficient pure democracy may be when confined to a small enough area, its inefficiency is demonstrated and demonstrable on any large field. It is absolutely impossible for the average man, burdened to the limit with his own personal affairs, to study, analyze, determine and direct public affairs. The utmost that he can do is to make a decision when the two sides of any question are clearly presented to him. And the two sides can only be properly presented when courageous leaders, acting after the most painstaking consideration and effort, have reached and expressed the maturest judgment. If representatives of the people were really chosen as they should be, for their courage, their character and their attainments, representative democracy would produce this result. Chosen as they are and acting in the atmosphere produced by the prevailing tendency, they act along the line of least resistance and yield principle to expediency.

When the public becomes aroused upon any subject and feels that it has not been properly handled by the officials, the present remedy is a resort to pure democracy. The people are then supposed to be able to acquire the knowledge, to furnish the intelligence, to find the time, and to have the ability to absorb and deliberate upon and to properly decide and direct these matters of great public concern. Having refused to live up to the responsibility of selecting proper representatives and giving them proper support while they deserve it, the people seek to supply the deficiency by an impossible mass judment. Paying so little attention to essential matters as to produce inevitably a disadvantageous situation, they are supposed to be able almost instantly to apply the proper corrective when their collective judgment is appealed to.

Flattering as is such an assumption, it is almost inconceivable that any reasonable man should believe in its truth. It is not the fact that representative government can be successfully so carried on. It is not the fact that supineness in the matter of attention to the choosing of proper representatives can be reme-

died by attaining a collective judgment upon the proper conduct of public affairs. It is not the fact that matters requiring minute attention, careful consideration, thorough study and courageous and independent judgment in their decision, can receive such at the hands of men who realize that their greatest hope of reward is to give what is asked for without regard to ultimate consequences which do not immediately concern them. It is not the fact that such questions can receive proper consideration and decision by the mass of the voters in the short time given to their consideration before the decision must be made.

It is the fact that by the shrinking of the individual citizen from the doing of the numerous things which he as a citizen should do and should not look to his government to do for him, by the shrinking of his immediate government from measuring up to the full adequacy of its responsibility, by the shirking of the state government from assuming and bearing its full measure, and by the casting off upon the federal government of duties alien to its nature and purpose and subversive of the reason of its existence, we are deliberately and directly perverting the foundation upon which our whole system rests. In some instances the things done are directly violative of the fundamental constitutional law; others are just as violative of the conception of the system, although not within any constitutional inhibition. Whether directly opposed to the written law or just as positively opposed to the spirit which animated our being, the effect is identical. It destroys that reverence for law which is the absolute and imperative necessity for successful democracy.

Side by side with these tendencies and actuated by the same causes is another development of the times. There has sprung up a belief in the efficacy of mere legislative enactments. It is a curious confusion of thought which results in believing that law and laws are the same. It is literally true that in the making of laws there is no end. All of the ills to which mankind is heir are supposed to be remediable by the making of statutes. Whatever ails the individual man or the community evokes an outcry for immediate legislative consideration. Nothing is to be left to individual initiative, individual discipline of character, or to public opinion sustaining the upright and the just and

ostracizing and minimizing the effect of those who do otherwise. Laws by the hundred and laws by the thousand are enacted affecting the citizens from the time of the rising of the sun to the going down of the same, and government intrudes itself into every activity of mankind. Again, I suppose it is necessary for me to say that I am not now considering whether it is wise that this should be so, or whether it is unwise, but I am saying and am emphasizing that it is absolutely opposed to every fundamental conception which went into the making of our government. It was never intended that our central government should have any such paternalistic participation in the daily life of man. It was conceived upon the theory of a federal agency to attend to federal affairs which were national in their scope and which necessarily could not be attended to by the states acting separately. Its jurisdiction was carved out of the plenary power of the states and was carefully limited in its scope so as to serve properly the purposes for which it was intended. It was, of course, given the most adequate power within the fields granted it, but the fields granted it were specifically limited and prescribed. By the modern tendency of casting innumerable duties upon the federal government which it was never intended that it should exercise, we are not only entirely changing the frame work of our system of government, but are producing a situation which cannot endure. The federal government will break of its own weight unless the tendency is checked and a return to correct principles is had.

The most casual consideration brings to mind the extent of the departure. Initially the federal government started with one executive head and three heads of departments. There was a secretary to attend to the affairs of state, one to attend to the finances of the nation, and a third to manage the military and naval arms of the government. We now have ten heads of departments, and there is scarcely a human activity that is not the subject of federal participation in one form or another.

By the law of its origin and being, and as conceived by the founders, the federal government was absolutely confined in its activities to those things which the states could not do separately; those things which were truly and essentially national in their

nature and scope; the making of treaties and the managing of foreign relations; the coining of money and the regulation of currency; the regulation of commerce between the states and with foreign lands; the collection of revenue and the protection and defense of the country by an army and navy; the handling of the mails and other like essential national functions. So far have we departed from the spirit that animated the system that it is almost impossible to realize that these really are the constitutional limits and the sole source of federal power and jurisdiction.

We have now departments or bureaus or agencies of the federal government which deal with food, with drink, with mining, with farming, with standards, with education and with health. We have bureaus of animal industry and of home marketing. We cure disease in human beings, in horses, in hogs and in wolves. We distribute seed and attend to diseases in plants. We dredge and improve harbors and build and operate railroads and canals and run steamboats. We regulate transportation and the morals of those who travel. We pass judgment upon the labels that patent medicines may bear, and instruct communities in the proper way to build roads and to improve husbandry. We are about to engage in building roads in the various states and in managing ocean transportation and regulating the daily labors of mankind, and the hours and conditions thereof. Does any individual community suffer from fire or from flood? The national agency and the national treasury is immediately called upon for relief, rehabilitation and restoration. The citizen in his daily business transactions is brought into intimate relation with the federal government by bureaus or agencies that have jurisdiction to regulate, prescribe and practically to prohibit. Anomalous bodies without constitutional form or substance are necessarily created to exercise these anomalous and unprecedented powers.

Some of the functions thus exercised should not, I submit, be done by government at all. Others are clearly the duty of the local, civic or state government and should be left to them.

The central government has duties of its own of such magnitude and importance as to occupy all of its time and attention, and, furthermore, is not so circumstanced that it can success-

fully or properly diffuse itself throughout the nation and touch the citizen in every activity of his daily life.

That which has been utilized by way of argument or persuasion to produce the present situation is capable of being extended to any limit so that it is proper to say that there now is no limit. Efficiency and the public welfare—these are the justifications of every novel exercise of governmental power. It is undoubtedly true that a city can more effectively do certain things than the individual citizen, but if it is his duty to do them he should be required to bear his own responsibility and not slough it off upon the municipal government. In like manner, the supposed efficiency of the state with respect to many concerns which belong to the cities should not lead, as it does, to the states intruding upon the proper responsibility of the city and doing its work for it. The state should refuse to take over that which belongs to the smaller municipal unit. And the same is true of the nation.

Apart from what has already been adverted to, that the mass of duties thus unwarrantedly cast upon the central government will inevitably break it down from sheer weight, it is a disastrous yielding to expediency in the face of principle thus to stretch the powers vested in the general government even to satisfy the popular cry of efficiency and public welfare. Real efficiency and real public welfare can only be continued and effectively served by adhering to the essential law of our being, by keeping our system of government within its proper confines and bounds, and by not flying in the face of the law and bringing it into disrepute for some supposed immediate benefit to be derived from the easier course.

It is just because of the sentimental infusion arising out of the appeal to the supposed benefits of yielding and conceding in these respects that the great difficulty comes in combatting the tendency and applying the corrective.

If new conditions really make necessary any alterations in our form of government, I insist that we ought to meet such conditions only by a frank and open abandonment of the present, and by the adoption of the new form. At the present time we are evading and avoiding the issue. We are not openly and di-

rectly altering the organic law by making the changes in it to justify our present conduct, but we are maintaining the law as written and violating it in spirit and in action. We are bringing the law notoriously into disrepute and engendering a fatal lack of reverence for it. Without such reverence, I reiterate, no experiment in representative democracy animated by the spirit which gave rise to our government can hope for success. We who are ministers of the law necessarily are the first to perceive this—are naturally the ones most to deplore it—and upon us rests the largest measure of responsibility of attempting to correct the evil.

If it be true that the representative system which is the very basic principle of our government is being perverted until its very existence is threatened; that the federal element has been ignored almost to the point of being neglected, and that the lines of responsibility between the states and the nation are now so faintly traced as to be almost undiscernable; if it be true that in the name of efficiency and the public welfare the national government is becoming overburdened to a dangerous degree and is exercising functions entirely alien to its constitution and spirit; that all these tendencies are not only not being combatted by any vigorous opposition, but are instead receiving practical encouragement on every hand—if it be the fact, as I firmly believe it is, that such tendencies unless checked will make the success of our system of government as devised impossible and will ultimately result in chaotic conditions, the end if which no one can prophecy—then indeed is there a great duty laid upon all who perceive and appreciate the situation.

It is no welcome or easy task. It will indeed be a case of voices crying in the wilderness; and were it not for the comfort derived from the knowledge that voices crying in the wilderness have finally sounded in the ears of men and produced tremendous results, the outlook would indeed be infinitely discouraging. But there is ground for hope, legitimate ground. The real thing to insist upon is not in itself abstruse. The real appeal is to that which we all hope we possess—manhood and courage. Though it required capacity of the highest order to conceive and put together the delicate machinery, with its careful balancing of

parts to produce successful operation, it is not so very difficult to convey a proper understanding of the machine as constructed.

The beginning and the end is of course with the individual citizen. It must be made to see that the success of his government absolutely depends upon his own proper conduct with respect to it. He cannot shirk his responsibility and expect that anything other than untoward results will ensue. He must be made to realize that government in a democracy partakes of the aggregate virtue or weakness of those who compose the citizenship. That if he is self-reliant and disciplined and will take the time and trouble to choose proper representatives, he may expect the beneficial results which would flow therefrom. That if he is negligent and inattentive to public affairs he will reap the inevitable result of such failure. That immediate benefits caused by the perversion, or subversion, of government can never outweigh the deleterious effect upon the structure itself. That each unit of government must bear to the full its own measure of responsibility, and that if it is supine and drops from its nerveless grasp duties which are thereupon cast upon some other unit, it not only suffers from its own weakness but participates in the general bad result produced by disarranging the whole system upon which the structure of government is founded.

Ripe and mellow are the conditions produced by the prevailing tendency for the demagogue and the charlatan. Eager to enact into law every humanitarian impulse that is suggested, sure that the onrush of popular sentiment will sweep over the opponent who only has cold reason and right to support him, they urge on the people from one excess to another in the abuse of power. It has come to pass that it is almost a reproach to refer to constitutional limitations. Impatience is the reward of those who try to urge them.

Until the people come to see that what we are dwelling upon is essential, we may hope for little sympathy or encouragement in our labor. I do not despair that we can cause them to see this. The time must come when it will be possible to point out that the greatest good to the greatest number must result from adhering to the essential spirit that animated our existence. That if this tendency is unchecked and power without regard to

authority therefor is exercised merely because it promises beneficent things, there is nothing which stands between the citizen and absolute tyranny.

The only protection which the individual has is the rigid adherence to the law which protects him with respect to his inalienable rights. If the law is violated even in the name of public welfare and humanity there is no longer any protection whatever for the individual. The will of the majority acting in violation of a constitutional principle can be and is just as much an exercise of sheer tyranny as the unrestrained will of a single tyrant. The very essence of representative democracy as devised and designed for our government is the functioning of each unit within its own sphere.

It is true, and it is unfortunate that it is true, that those who are most easily beguiled are those whose yielding is most threatening to their own interest. The humble, the poor, the powerless are those who heed the protection of law cast about them by constitutional provisions rigidly adhered to. The rich and the powerful in all ages and in all governments are able to protect themselves without regard to written law. By enticing the people with promises of great benefits to be bestowed, the very structure which was erected to protect them is rent apart and great gaps are left in its walls through which enemies may at any time enter. Appeals to prejudice and to pride delude men into the belief that their government can be properly run by such time and attention as they can give to it in the few days preceding the periodical election of officers. This is not so and never can be so.

In this vast country with its varied characteristics and its numerous population, it is a miracle of miracles that the government as devised and conceived was not only adequate but ideal for its purposes. Its proper purposes can never be served either by pure democracy or by the hybrid of pure democracy and representative democracy toward which we are now rapidly proceeding. Home rule from the citizen up is an absolute essential element in our system and self-reliant responsibility and bearing of proper burdens is imperative.

These things are the very warp and woof of our system. They were written into our state constitutions and our federal con-

stitution. They are known of us and should be known to all men. The time has come when silence is no longer permissible to those who perceive the nature and extent of the danger. It is peculiarly the province of lawyers to lead in this great movement which must be undertaken before it is too late. Is it therefore to this national conference of the lawyers of the land that I make this appeal.

From the beginning of the government to this day the lawyer has nobly responded to every appeal to his patriotism, to his ability and to his courage. The present appeal makes infinite call upon each of these qualities. I feel confident that as in the past with other great questions, this great national question will receive such attention and treatment at your hands that the nation will some day realize the debt it owes you for the great duty that you will perform.

## THE LAWYER AND THE PUBLIC.

BY

SENATOR WM. E. BORAH,

OF IDAHO.

We live under a form of government which permits no man to escape with honor his proportion of service to the public. We live under a form of government wherein for better or for worse every man must inevitably affect in some way the public weal. Whether he is at the head of a great transportation system or merely a pauper in an almshouse, his influence for weal or woe is felt somewhere and in some way and to some extent. We are, in other words, in a larger, stronger, more important sense than ordinarily understood, sovereigns. We carry with us the obligations and duties of a sovereign. We cannot escape responsibility.

The difference in responsibility between a man in public office and the citizen in private life is one of degree only. Both are bound in the highest way to give of their time and their thought to the public, the former more continuously, perhaps, and more specifically, but the latter, though less continuously and less specifically, no less certainly. If there is a bad law upon the statute books the legislators alone are not to blame. If the laws are poorly enforced the executive branch of the government alone is not responsible. If evil exists in the community, if injustice or oppression somewhere prevails, the officers are only partially responsible. We cannot discharge the duties of citizenship by simply technically obeying the law, or by finding fault without offering a remedy. We must mold public opinion which makes the law, direct public opinion which enforces it. We must, above all things, perform in full the duties of citizenship before we condemn for inefficiency the institutions under which we live. The call is less for a change in institutions than for a change as to the vigilance and civic activities of individual citizenship.

"Those eighteen men upon whom the tower of Siloam fell and slew them, think ye they were sinners above all men that dwelt in

Jerusalem? I tell you nay." If there be evils menacing our institutions, if these evils seem to strengthen year by year, the law makers and administrators of the law are not the only sinners in Jerusalem. This is our government. We are its custodians. We are bound, then, in private life to be alert every hour and exert our influence in every reasonable way for its betterment or protection. Behind the officers who seek to know the right and to do it there should be a well-organized and well-sustained public opinion, that they may not make their fight in vain. The public has no more right to elect a man to office and then turn its exclusive attention to private affairs, leaving him without the support to which he is entitled, than the rank and file has to desert the general upon the field of battle. The officer who takes his oath, assumes a place in public service and then devotes his time to private affairs, or gives it over to personal pleasure, affords only a more conspicuous example of reprehensible citizenship than the man in private life who finds fault with the state and the government, but gives neither time nor thought to the caucus, remains away from the primary, or on account of business fails to go to the booth on election day.

But if the lay citizen owes something to the public, far greater the obligation of the lawyer. Obligations to the public are to be measured according to ability and opportunity to serve the public, and the public interest has a right to exact services in proportion to our ability to meet the exaction just as the government should collect taxes in accordance with the ability to pay. Ever since communities began to adopt rules by which their members consented to be governed, the lawyer has been of great and exceptional service to the public. He has been called upon in almost every emergency, from the drafting of the more important ordinances of a town meeting to the most tremendous concerns of state, and when called he has in the past given of his time and learning without money and without price. No member of the profession looks back upon those services characterized with singular wisdom and self-sacrifice without emotions of professional pride. But the days that have gone carried no greater responsibilities than the days that are coming. Almost every conceivable question, almost every matter of moment to the citizen at this time involves in some way a knowledge of law and the training which enables us

to adjust well-known legal principles to our new industrial and social conditions. And if I were going to put in homely words, almost in the language of slang, the plea of the American people to this honored profession in the present crisis of our affairs, I would say their plea is that in this great task of readjustment and of extending legislation to new matters the American Bar give of its marked ability to keep the jokers out instead of its marked ability to put the jokers into such legislation. A joker, as you know, is a legislative deception, a lie upon which, through the carelessness of some or sinister motives of others, the great government places its solemn and sovereign approval.

Our courts are being constantly assailed for constructions placed upon our statutes. But candidly, the marvel to me is, in view of the influences which surround legislation, the careless and indifferent manner in which bills are drafted, the selfish, sinister influences which warp and twist our statutes in the making, that the courts have done as well as they have in interpreting them. When legislatures and Congress enact laws, so involved and ambiguous that their meaning is difficult of interpretation by the authors of the law, it is no surprise that courts sometimes fail to apprehend their purpose or differ as to the construction to be placed upon them. Some people seem to think that we need for the Bench not lawyers but clairvoyants and mind readers.

What a powerful influence for good if these statutes in their framing, as they are slowly passing with their belated gait through the halls of legislation, could have the scrutinizing and fearless attention and criticism of our great lawyers, acting solely and alone in the public interest. For there is to my mind no more independent, free and untrammeled influence for good government and for great things in a community than the lawyer of character and ability. He secures his business because of his great capacity to take care of it. Men employ him whether they like his views upon public questions or not. His intellect, therefore, is the slave of no combination in politics, his tenure of position in the community turns not at all upon the fortunes of political parties. If the American Bar would look in upon our great statutes, especially as to the more important and leading measures, somewhat as the great lawyers in private life looked in upon affairs in 1688 and 1787, it would be a wholesome influence,

the extent of which could be measured neither by time nor words. You say that this is a great deal to ask, a great deal to expect that men turn aside from their personal concerns to help with the work which others have been selected to do. But I reply that there is a vast amount at stake and further give it as my deliberate opinion that these institutions of ours cannot be kept intact if we are to depend alone upon those who happen to hold public office. Ours is a government of public opinion, not in a superficial way but in a most profound way. It was designed to be so and it cannot thrive, it cannot live, except it be sustained by a well-informed, eternally vigilant and thoroughly sustained public opinion. I know, and you upon reflection will agree with me, that the best laws, the great charters of right and justice, the profound movements for a richer and broader political level have not originated in official life nor in the starved and technical atmosphere of bureaus and departments. But they have sprung from the great body of the people, independent and hopeful, and have only passed to the legislative hopper for final form.

There can never be a more serious strain upon free institutions than that which is brought about in an effort to adapt the principles of established institutions to new industrial and social conditions. If we shall avoid destroying that which is essential to free institutions and at the same time incorporate the things which are necessary to meet the new situation, we shall have need of all aid which may be summoned from the entire body of the people. In an event like this, the public, our children and our children's children, the present and the future, are entitled to the best brain and the noblest capacity of the greatest of all secular professions. The American lawyer looks out upon a field crowded with problems equal in moment and fully as difficult as those with which Selden and Marshall dealt. He ought to find time, if possible, to share in the pleasure and exhilaration as well as the glory of working not now and then but daily in this vineyard.

But while this seems to be the plain duty of the lawyer not in office, what are the equally plain and more obvious duties of a lawyer who has entered the halls of legislation as a sworn officer and with the public alone for his client? Upon this subject I am quite aware that I hold views different from many members of the profession to whose integrity and learning I pay the tribute

of my respect, though I cannot agree with their views. I do not believe that a lawyer has any more right, as a matter of correct public service, to hold a retainer while writing a law in the public interest and that a law which may affect his client adversely, than has a judge to hold retainers from those whose interests may be affected by the decisions which he renders or the judgment which he signs. This will seem to some an unreasonable statement, but I challenge anyone who has the time to analyze thoroughly and consider all the facts to distinguish upon any grounds, except fanciful ones, the difference between the two situations. Is it not as important to the public that laws be framed free of the influence, conscious or unconscious, of private interests as that they be administered free of such influence? Custom has inured us to a different code of ethics, but this custom has brought in its wake many inapt, inefficient statutes, timid and ineffective in their terms, shielding special interests and protecting private advantages and altogether inefficient for the service and protection of the public interest. I maintain that many of our important statutes are inapt and ineffective because of that timid, compromising spirit born of an effort to adjust conditions which cannot be adjusted and which ought not to be adjusted.

There is no relationship in the business world closer or of a more confidential nature than that of lawyer and client. The danger line of the lawyer is not on the side of not going far enough for his client, but rather that in his zeal and interest he goes too far. The characteristics of a great lawyer are that he makes his client's case his own, sympathizes with him, takes on his view, becomes in spirit as well as in fact his advocate, and his difficulty lies in restraining himself in emergencies against doing those things which he would not think of doing for himself. Impossible or unreasonable constructions are placed upon laws and backed up by ingenious arguments wholly out of zeal to do his full duty to the client. The very trust reposed arouses a high-spirited man to the fullest exertion of his power. The relationship of client and attorney is the closest. Consciously or unconsciously he comes to feel that his client's demands are wholly just. Yet men will argue that a lawyer with a thirty or forty thousand dollar retainer from some client is perfectly fitted to shape legislation which his client will argue is all wrong, wholly

unjust and vitally injurious to his business interests. I am not speaking now of a conscious corruption which some people assume to take place in legislation more often, perhaps, than it does. There is no occasion for conscious, open, affirmative corruption for which some one may be sent to the penitentiary when the same thing can be accomplished by that unconscious and subtle influence for which there is no punishment and which may even be justified by good people. Suppose every lawyer in the legislatures of the country or in Congress were in the employ of those great business interests engaged in interstate commerce. What do you think would be the necessity of employing lobbyists in order that no laws seriously affecting interests might be passed? A member of Congress is in an indefensible position who is called upon to legislate concerning those matters in which his clients may have an interest and which may concern them vitally. The man who would be permitted to walk into my office in Washington as my client, paying me a large retainer, and in after months sit down to argue against a bill which has come up for consideration would have a vast advantage in impressing me with his views over the public, the far removed and wholly impersonal public who pays me nothing more than my board and seldom calls at all. Men do not give large retainers to men engaged in public service in order that these men may more thoroughly look after the public interests and out of sympathy with the small salary which they get. They give them because they expect them to be amenable to reason in an emergency, and in order that they may be sufficiently conservative in not yielding to that radicalism which takes alone into consideration the public interest.

You would impeach a judge who would consult with a client over a decision whether the decision affected him or not, even a discussion of the wisdom or unwisdom of such a decision. In fact, you would impeach a judge who dealt in a business way with litigants before his court. A few sessions ago we had the painful duty imposed upon us of unfrocking a federal judge. You may think it an easy thing to do, but whatever your convictions as to the necessity, you will move on to a performance of that duty with reluctance and pity. I do not hesitate to say that in the realm of strict morals, in the matter of correct public ethics and of true and upright public service, the judge thus unfrocked

was guilty of precisely the same offense and no other and greater than that of the legislator who draws a salary of $7500 a year from the government and $25,000 from some client, and flatters himself that he can thread his way with honor and a clean conscience between the public interests and the antagonistic demands of private interest.

But let us concede, for the sake of argument, that he can successfully thread his way and satisfy his conscience, and let us pass over the structure of the conscience and seek not too closely to inquire how it arrived at its present structure. Still there is another proposition almost equally grave. Next to efficient and conscientious public service is the prerequisite of the confidence placed in that service. Next to the virtue and worth of the law that is written is the faith of the people in the law and in those who have made it and who are to administer it. This government rests almost entirely upon the confidence which the people have in it and in those who administer it. Without that confidence the government could not operate or long maintain itself. If a legislator should feel that the rights of some great corporate interests were being unjustly assailed, if he should feel that some law which seemed to favor interests then under public censure was entitled to his support, he would be perfectly powerless to be of any service to them if it was known that he held a retainer from those engaged in a similar kind of business. In other words, it is just as important that the legislator be free from entanglements and those associations which seem to direct his actions in order that he may do justice to the business and corporate interests of the country as that he may do justice to the public. If he feels called upon to make a fight for the rights of those under public censure I cannot imagine his being fitted for that fight unless he is wholly disengaged in every conceivable way from any business or personal interests in the result.

I venture to prophesy that the people will in due time insist that their representatives in Congress shall stand as free from the relationship of client and attorney with reference to all those matters upon which they are called to legislate as now characterizes the great tribunal which passes finally upon the constitutionality of the laws which we make. There is a large class of professional business wholly disconnected in every way from the

public service and which the public service will not affect one way or the other, and as to this business there is no reason why a lawyer, if he finds time, may not enjoy the remuneration which comes from attending to it. In fact, it may well be argued under the present compensation allowed to Senators and Representatives that such work is essential in order that a man may clothe and educate his family. But with all that class of professional business which deals directly with those subject matters concerning which we legislate, the lawyer in public service must consent to be divorced wholly and completely.

An interesting and in many respects a remarkable debate was held in the English Parliament some time past on the Marconi affair. The relation of certain members of the cabinet to this business enterprise threatened the life of the ministry. The brilliant prime minister, speaking with unusual gravity and with manifest feeling, and with even more than his usual clearness of thought and precision of language, said: "There are certain principles, certain rules which are rules not only of morality but of common sense and are beyond dispute. . . . . The most obvious is that ministers ought not to enter into any transaction whereby their private and pecuniary interest might even conceivably come into conflict with their public duty. . . . . No minister ought to allow or to put himself in a position to be tempted to use his official influence in support of any scheme or in furtherance of any contract in regard to which he has an undisclosed private interest. . . . . No minister ought to accept from persons who are engaged in negotiation with or seeking to enter into contractual or proprietary or pecuniary relations with the state any kind of favor." Again he says: "Such persons should carefully avoid all transactions which can give color or countenance to the belief that they are doing anything which the rules of public obligations forbid."

These rules apply with tenfold effect when the relation of client and attorney is involved. We should not attribute the timid and ineffective, undigested and unconstructive legislation of these days to affirmative and specific corruption as some seem to do—that seldom occurs and never to the extent that it of itself would materially affect legislation. We should attribute it to that to which it is due, to wit, men do not set themselves apart and

dedicate their intellectual powers to the public service. Public service—official life, is an incident in the career of the American citizen, a stepping stone for youth, an adornment for old age. The great, central, controlling, absorbing thought is that of acquiring wealth, either through professional or business channels, and that dominates and directs and shapes our life as a people. At some time or other men choose to pass in and out of the public service, but even in those brief years they give but partially of their time to the public. We flatter ourselves that a few years incidentally bestowed will enable us to master the vast problems of the age, that devotion and concentration of purpose and thought are unessential, that the greater portion of our time may well be given to the dominant motives of modern society, to wit, the making of money. The result is that while we succeed marvelously well in the business world we legislate in that halting, makeshift fashion which leaves our statute books crowded with incomplete and undigested laws, and those questions, the proper solution of which means no less than the preservation of our institutions, are pushed aside from day to day and from decade to decade.

Our government is the last best fruit of civilization. The principle upon which it is founded has now traveled its way around the globe. In its supreme power the humblest born may ultimately share, and when administered in harmony with its purposes and its design, the proudest and the strongest must obey its mandates. It neither circumscribes genius nor ignores the ungifted and the weak. Status has no recognition in the scheme of its being, but rather energy, change and progress everywhere. Life, liberty and property, in the order named, are the supreme objects of its care, and nowhere on God's footstool have men so universally shared the blessings of those guarantees and to no other country do men crowd in such throngs in order that they may share them. In its whole vast fabric from turret to foundation stone there is no place where special privilege or monopoly may with safety rendezvous save by the connivance or indifference of the people or the neglect or cowardice of their public servants. Those who declare otherwise declare so in ignorance of the principles of the government under which they live, or because they have not the courage to assail the wrong, and forsooth, in sheer incompetency

and unworthiness, lay their faults upon the government—"as if we were villains by necessity, fools by heavenly compulsion."

But the whole scheme, the whole stupendous affair, its efficiency and its strength, rest at last upon the shoulders of the individual citizen. The entire structure has no other guarantee, no protector save an enlightened public opinion. We can make up our minds once for all that if we are not willing to make the sacrifice in time, thought and means by and through which citizenship is kept up to the highest standard of intelligence and physical well being, and by and through which the powers of the government are exerted for the general welfare, then while we may have some form of "organized hypocrisy," some shambling pretense of a government, we will not have a republic in fact—a free, wholesome, uncontrolled government having its well springs of national purpose and power in the esteem and affection of a loyal and devoted people. We can make up our minds that unless we come to recognize that in office or out of office every citizen is a public servant and owes something in time, thought and effort to his country and state and government, unless we are willing to step aside from the gathering of wealth a portion of the time and look in upon the condition of our laws, of our institutions and the needs of society, unless we understand and live up to our understanding that a truly free government is a living sacrifice, we must prepare to live under a government managed and directed by the selfish few for the many. There are those who seem honestly to believe that if a man can only succeed in getting himself born, that is the last exertion he will ever be called upon to put forth; the state will do the rest. But the state in all its strength, in all its plans, can only go out to meet the citizen coming in; it can only furnish the instrumentalities which he in good faith shall use.

Many plans are proposed in these days to bring the government closer to the people. Some of these plans will have the effect proposed. Some will, in my opinion, remove the government not only beyond their control but more and more beyond their concern. That which tends to make government machinery cumbersome, heavy and expensive will in the end estrange people from its operation. But the danger is not after all that democracies are given power to decide, as some so much fear, but that decisions are

made in indifference. The danger lies in the fact that while good men and women are busy about their private affairs, engrossed with personal concerns and therefore absent from the polls and disregardful of public affairs, those seeking purely selfish ends may seize these facile instruments of popular power and use them solely for their aggrandizement. The initiative and referendum, even if admitted to be grounded in sound practice, will work just as well for an organized band of political vagrants as they will for the best men and women in the world. If the latter are absent and the former present it will be no different in the final result than if we were the creatures of a hereditary oligarchy. No scheme of government, no dream of popular rule can work or come true with individual initiative, individual responsibility and individual sacrifice left out. Any scheme which dulls the initiative of the private citizen or lulls him into indifference to the public interest upon the theory that in some way and somehow the plan will itself bring wisdom and justice in public service and prosperity and well distributed plenty is a dangerous delusion. Any political philosophy which seems not to demand sacrifice of time and thought, which seems not to require men to step outside of their private interests and away from their professional obligations and to look with an unselfish view upon the public welfare, and pay toll in thought and high purpose as well as taxes to the government, will never be anything other than the tangled and deluding ensnarement of demagogues and dreamers, to the ultimate humility and undoing of the people. No other form of government registers so sensitively and so accurately the weakness and strength, the vices or virtues of the individual citizen as ours. And none, therefore, finds perpetuity so completely wrapped up in his individual strength and patriotism.

The lawyer is in the truer and broader sense a public servant. He secures his privilege to practise his profession from the state, he depends at last for his success upon the favor and esteem of the public, while his studies and researches lead him to the very beginnings of government to familiarize himself with the sources, the limitations and jurisdiction of sovereignty. From the beginning he has stood with firmness and remarkable vision about the birth scenes of human rights. The great charters of human freedom are in his handwriting, the great statutes of justice and

equity are of his shaping and the noblest institutions of the human mind bear the impress of his genius. Romily and Selden, Coke and Mansfield, Otis, Hamilton, Jefferson, Madison, Marshall, lawyers and statesmen, and thousands who might be named with them, call us away from the purely personal pursuits of individual gain and suggest greater emoluments and more permanent laurels. We as a profession owe a vast amount to our age and time; the public has a right to expect much at our hands. These are difficult problems which the human race is now seeking to work out, involved, complex and of tremendous moment. In them are the profoundest questions of government and law—does not the conflict call for volunteers, and will a profession which has graced with its learning and its leadership every conflict yet waged for better government and for higher ideals succumb to the sodden pursuit of wealth and ease while the battle rages? We look upon the great battles of our two great wars and speak of the sacrifices which those men made in order that this government might be established and preserved. We know, too, that should such a crisis come again men would crowd the camp for enlistment. But will you argue with me when I tell you that there is a brand of courage even yet more incomparable, a finer, rarer fiber of manhood, that courage, that manhood which amid selfishness and criticism and in spite of personal interest, and at the risk of personal aggrandizement, with neither fife nor drum nor pomp nor circumstance, the long year through fight the subtle, persuasive, sometimes vindictive and always active forces which seek in civil life to encompass and control to selfish and low ends the instrumentalities and forces of free government, or those who on the other hand in madness and folly, in their selfishness and self-seeking would wholly shatter and destroy the freest and most efficient government which in God's providence has yet blessed the earth?

In anything I have said I have not had in mind the discrediting of the great profession of which I am proud to be an humble member. Neither has it been my intention to criticise or discourage any particular plan or movement which have for their ultimate purpose the holding of the powers of government more completely within the hands of the people. In so far as any plan accomplishes this I heartily endorse it. I have only sought to

accentuate amid all plans and schemes there must exist the vital and indispensable element of personal initiative and personal responsibility and personal obligation. No scheme of government can succeed unless the citizen understands and willingly discharges in the fullest sense his obligation and responsibilities to society and to the government. With a strong, virulent, self-reliant citizenship we may face the future with calm and assurance. And it is as an appeal to this feature of power and responsibility that I have spoken in an inadequate way, but with sincerity, to the members of that great profession some of whose most brilliant minds adorn the Bar of every commonwealth of the union.

# PRIVATE RIGHTS AND ADMINISTRATIVE DISCRETION.

BY

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In order to obtain an adequate understanding of the private rights of individuals on the one hand and of the extent of administrative discretion on the other hand, it is necessary to examine in some detail both the methods of administrative action and the judicial remedies which are open to the individual claiming himself aggrieved by that action.

Administrative methods and judicial remedies will on such an examination be found to be much less dependent on constitutional limitations than is perhaps ordinarily supposed. These limitations are, as interpreted by the courts, directed rather to legislative than administrative action. They prevent the legislature, for example, from declaring that to be a nuisance which in the opinion of the court is not a nuisance, but once the character of nuisance is admitted, they permit of the most drastic action in its abatement on the part of the administration. Constitutional limitations do, of course, indirectly limit administrative activity in so far as that activity is based upon legislation, since the legislature may not grant to administrative authorities a power which it does not in itself possess. But, apart from such a limitation, constitutional provisions do not seriously affect many forms of administrative activity. We may, therefore, almost leave out of consideration the private rights provisions of American constitutions in the treatment of our subject.

I have said that our attention must be directed both to administrative methods and to the judicial methods available. Let us now take up one by one the most important methods by which administrative authorities act, and consider at the same time the remedies open to the individual who deems himself aggrieved by that action.

### I. Administrative Regulations.

The first method of administrative action to which I wish to call attention is that of regulation. The characteristic of this method is that it attempts to affect the relations of private individuals through the promulgation of rules of conduct of general application. In general, it may be said that few, if any, administrative authorities have in accordance with American law the right to issue such regulations in the absence of statutory authorization to that effect. (Potts *vs.* Breen, 167 Ill. 67.) On the other hand, it is just as true that there are a great number of administrative authorities to which such a power of regulation has been given by legislation. This is so, notwithstanding it is the theory of our law that our legislatures may not delegate legislative power. For our courts have commonly held constitutional statutes granting to administrative authorities the power to regulate the details which must be regulated in order that much legislation may be made really effective. (Buttfield *vs.* Stranahan, 192 U. S. 470; Health Department of City of New York *vs.* Rector, etc. of Trinity Church, 145 N. Y. 32. ) It is also constitutional for the legislature to delegate to administrative authorities the power to impose criminal penalties for the violation of administrative regulations. (O'Hover *vs.* Montgomery, 120 Tenn. 448.) And it is often the case that a provision of the penal code or some other statute specifically provides penalties for the violation of administrative ordinances. Indeed, without any such provision of law it is competent for local corporations both to issue local ordinances or by-laws and to provide penalties in the nature of fines which may be recovered in an action for debt. (Mayor of Mobile *vs.* Yuille, 3 Ala. 137.)

Where a provision of statute clearly authorizes an administrative authority to promulgate such regulations, it is seldom the case that its discretion in the exercise of its regulatory powers is subject to any control. Of course, as has been said, the legislature may not delegate to an administrative authority a power which it does not itself possess. Any attempt on the part of an administrative authority to enforce a regulation which it has not the power to make may in the proper method be rendered nugatory by the courts. But so long as an administrative authority keeps within the power which has been constitutionally delegated to it, its dis-

cretion in the exercise of its power of regulation is not subject to effective control. It is seldom that a regulation, to be valid, needs the approval of any superior administrative authority. It is almost never the case that a regulation issued by an administrative authority is laid before the legislature for its action, as frequently happens in Great Britain. The only possible control which may be exercised over the discretion of an administrative authority in the issue of regulations is exercised by the courts through their power to declare void as unreasonable a regulation which is not clearly within the power possessed by the authority issuing it. As in not a few instances the power of regulation is granted in general terms, it is often within the jurisdiction of the courts thus to declare void as being unreasonable a regulation of an administrative authority. Where, however, the power to promulgate the particular kind of regulation at issue is certain, the question of its reasonableness is regarded as settled. The courts may not declare it void as unreasonable any more than they may declare a statute of the legislature void for the same reason. (O'Hover *vs.* Montgomery, 120 Tenn. 448, 467.)

We may say, then, that for most practical purposes:

First: Administrative authorities may and do possess wide powers of regulation; and

Second: The exercise of the regulatory power of administrative authorities is not, in very many important cases, subject to an effective control.

Both of these statements are true, notwithstanding the fact that these regulations are frequently adopted without any public hearings, by authorities organized in such a way that debate with regard to these regulations is impossible. The result is that it is not infrequently the case that the only view which receives expression in ordinances or regulations issued is the official view.

Furthermore, it is not seldom the case that regulations are adopted and enforced without adequate publication. For it is by no means clear that the law requires publication as a necessary prerequisite to the validity of an ordinance or regulation.

The individual is thus not sufficiently protected, either through the procedure required as a preliminary to the adoption and issue of regulations, or through the methods of control provided against the arbitrary use of discretion by administrative authorities in the exercise of their powers of regulation.

II. Administrative Action of Individual Application.

The second method of administrative action consists in the taking of action which affects some particular individual case.

The number of these orders or decisions of individual application, as they are sometimes generically called, is legion and their variety is very great. We may perhaps, however, attempt to classify them according as they affect what the law regards on the one hand as rights, and on the other as privileges. In the case of such actions of individual application as affect rights we may distinguish orders that something be done from decisions as to questions of fact or of law. In the case, however, of administrative action as to privileges, most, if not all, of the cases will fall under the head of decisions.

A. ADMINISTRATIVE DECISIONS AFFECTING PRIVATE RIGHTS.

*1. In Matters of Taxation.*

In matters of taxation, administrative action of individual application may, if we analyze administrative action generally, be said to be taken with the purpose of expressing in the concrete case the will of the state. Thus a statute may provide in a general way the taxes which all taxpayers of a certain defined class shall pay. This statute may furthermore be supplemented by administrative regulations such as the detailed and complex, if not incomprehensible, regulations with regard to the federal income tax. But no matter how detailed such statutes and regulations may be, it is impossible for any particular individual taxpayer to know what amount in dollars and cents of tax he will have to pay before a decision has been reached by the competent administrative authorities. Such a decision in almost all American tax laws is called an assessment or an appraisal.

The protection of private rights against the exercise of arbitrary administrative discretion is in tax, as in most other matters, dependent first upon the procedure which must be followed by tax-assessing and collecting authorities; and, second, upon the judicial remedies which are open to the taxpayer. The general rule of our constitutional law is that the due process of law clause requires that some time during the assessment or collection proceedings the taxpayer must have the right to be heard. If such

an opportunity is accorded to him during the administrative assessment proceedings, compliance with the constitutional requirement has been had and there is no constitutional necessity to provide a judicial remedy, or even an administrative appeal. (Pittsburgh, C., C. & St. L. Ry. Co. *vs.* Backus, 154 U. S. 421.) In this case it is said by Mr. Justice Brewer: "A hearing before judgment with full opportunity to present all the evidence and the arguments which the party deems important is all that can be adjudged to be vital. Rehearings and new trials are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment satisfies the demand of the Constitution in this respect." What has been said is, of course, true only as to the valuation of a taxable object, such as property, income, franchise, or import. It would probably be unconstitutional, though this is not absolutely certain, for the legislative authority to cut off the judicial remedy with regard to legal questions involving liability to taxation. Certainly such action would be unconstitutional if the attempt were made to deprive the courts of the power to determine the constitutionality of the action of the legislature in tax matters.

The law, however, sometimes provides something in the nature of a judicial remedy in the case of mere assessments or appraisals. In some states, as in New York, the writ of certiorari to review a determination has been made applicable to many tax assessment cases. In other states there is some form of statutory appeal to the courts from tax assessments. In general, however, it may be said that appeals to the courts with regard to the question of fact involved in assessment appraisal or valuation proceedings are not permitted.

The exercise of arbitrary administrative discretion in tax proceedings is perhaps carried the furthest in the law of the federal government. Here, as a result of statute as interpreted by the courts, practically every judicial remedy which elsewhere is open to the individual is cut off with the exception of an action for money had and received, brought after involuntary payment under protest against the tax collector. (Cary *vs.* Curtis, 3 How. U. S. 236; Cheesebrough *vs.* United States, 192 U. S. 253; Wright *vs.* Blakeslee, 101 U. S. 175.) And on such suits mere questions of valuation not involving questions of law affecting taxability

may not usually be considered. Thus, the customs law has often specifically provided that the appraisal of imported goods for customs revenue purposes, when made by the competent administrative authorities, is final. (Passavant *vs.* United States, 148 U. S. 214.)

The administrative decision fixing the value for purposes of taxation of a taxable object has in some cases also the characteristic of an order that something be done in the future, that is, that a certain sum of money be paid. Where this is not the case, this decision is made the basis of such an order. The amount to be paid is determined as the result of a simple mathematical calculation consisting in the multiplication of the ascertained assessment valuation by the tax rate. It is frequently the case that this order is executed by summary administrative process, and no suit in a court for the collection of the tax is provided in the law. Such summary administrative proceedings have been held by our courts to be the due process of law required by the Constitution. (McMillen *vs.* Anderson, 95 U. S. 37; Palmer *vs.* McMahon, 133 U. S. 660, affirming 102 N. Y. 176; Commonwealth *vs.* Byrne, 20 Grattan Va. 165.)

Where no provision for even an administrative hearing has been made by the law, the courts have sometimes, even in the absence of statute to that effect, permitted the individual taxpayer prior to the collection of the tax to have an injunction to restrain its collection, or subsequent to its collection to have an action against the collector for money had and received. Due process of law would seem to make necessary the existence of some such remedy. The injunction, however, is only very cautiously used (Dows *vs.* City of Chicago, 11 Wall. 108), and is absolutely prohibited by Congress in the case of the taxes levied by the United States (Snyder *vs.* Marks, 109 U. S. 189), while the action for money had and received is subject to so many limitations that its effectiveness as a tax remedy is greatly curtailed.

Finally, all such judicial proceedings are customarily regarded as collateral rather than direct proceedings, so far as concerns an assessment made after a hearing. Where a hearing has been provided and the decision on such a hearing has not been attacked directly in the manner provided by law, the court will consider in these collateral proceedings only questions involving taxable jurisdiction. (Palmer *vs.* McMahon, 133 U. S. 660.)

The result is that the individual is, by the American law of taxation, quite commonly subjected to the arbitrary discretion of the tax authorities so far as concerns questions of assessment valuation, and, because of the inadequacy of the judicial remedies available, finds it difficult, if not impossible in many cases, to secure a judicial review even of questions of law. This is particularly true of the smaller taxpayers, who, under the present methods of judicial proceedings, cannot afford the expense of an appeal to the courts against what they believe to be the unauthorized and illegal decisions of tax officers.

### *2. In Matters of Police.*

The gradual change in the United States from an agricultural to an industrial life, and the great increase of urban communities, have presented problems for the solution of which little if any provision was made in the common or statute law which we Americans received from England. English methods of dealing with what have been spoken of as "matters of police" were based on the law of nuisance. This law differentiated private from public nuisances, and apparently authorized any one to abate a public nuisance, while only one specially injured might abate a private nuisance. It did not make effective provision for anything in the nature of a public authority whose duty it was to promote the public safety and convenience. Indeed, almost the only ways in which public authorities participated in nuisance abatements were, first, in the indictment and prosecution of public nuisances; and, second, in determining, in the case nuisances had been privately abated, what were the rights of the parties concerned. For individuals who attempted to exercise their legal rights in the abatement of private or public nuisances did so at the risk of having the courts hold that what had been abated was not a nuisance.

The whole English law on this subject is a good example of those methods of self-help which are characteristic of rather primitive social conditions and of an undeveloped legal system based on individualistic rather than social conceptions.

The English law, as we inherited it, was naturally unfitted for the complex relations of modern industrial and urban life. Soon after American social conditions began to change, attempts were

made to change the law. The first attempts were made in the City of New York about the middle of the nineteenth century. The first point of attack was the method of abatement of nuisances by criminal proceedings. Such proceedings had shown themselves to be absolutely ineffective. The ordinary petit juries had been so regardful of private rights where the interests of the public were involved that the maintenance through existing methods of reasonably sanitary conditions was impossible. A law was, therefore, passed providing for an administrative sanitary authority—the board of health—whose duty it should be to preserve the public health. To this body was given the power, after granting a hearing to individuals who might be affected by its orders, to declare specific conditions to be nuisances, and to abate them. The constitutionality of this method of action was bitterly contested in the courts, but was upheld, the courts taking the view that the administrative hearing provided was due process of law, and that one who had not taken advantage of the opportunity to be heard before the board of health provided by law could not, in a subsequent collateral proceeding, such as an injunction to restrain the board of health from enforcing its order, attack that order as invalid. (Metropolitan Board of Health *vs.* Heister, 37 N. Y. 661 [1868].) But for some reason or other the example set by New York has not been generally followed throughout the country, nor has the procedure thus provided for the abatement of nuisances been commonly applied even in the State of New York itself.

The methods commonly adopted in this country for the preservation of the public health are adaptations of the old, primitive English methods. They seldom provide for anything in the nature of a hearing before sanitary authorities as to the actual existence of the nuisance of which complaint may be made. (See People *ex rel.* Copcutt *vs.* Board of Health, 140 N. Y. 1; North American Cold Storage Co. *vs.* City of Chicago, 211 U. S. 306.) They are almost always based upon the idea of summary abatement, a sanitary officer possessing in theory only the powers possessed by private individuals under the early English law. There is thus little opportunity to distinguish between a decision as to the existence of a state of facts, *i. e.*, the presence of a nuisance, and an order that something be done, *i. e.*, that the nuisance be abated.

Often the law does not require even notice to the parties affected (Health Department *vs.* Trinity Church, 145 N. Y. 32), though such notice is frequently given as a matter of fact.

These very summary and arbitrary proceedings have, however, usually been accompanied by such extensive judicial remedies that the effectiveness of nuisance removal proceedings would have been seriously diminished had the courts not applied the remedies with considerable caution, and had the application to the courts for the exercise of their powers of review not involved an expense too great to be justified except in the most important cases.

The most noticeable points with regard to which the courts have insisted on their powers of review are two:

In the first place, they have held, as has been said, that neither the legislature nor any administrative authority to which the legislature has delegated power may declare that to be a nuisance which is not a nuisance. (Evansville *vs.* Miller, 146 Ind. 613; Yates *vs.* Milwaukee, 10 Wall. 497.) This means, in plain English, however the courts may disguise and becloud the issue, that the legislative determination as to what conditions are nuisances is subject to judicial review. This rule of law is, however beneficent its operation may be and however wise the courts may have been in applying it, inconsistent with our general theory of legislative discretion. Its application, furthermore, has, in conditions such as have existed in New York City, been a serious hindrance to the progress of reasonable social reform. The decision of the New York Court of Appeals, for example, that the law prohibiting the manufacture of cigars in tenement houses was unconstitutional has very seriously hampered the administration of the public health law in that city, as well as made difficult, if not impossible, the regulation of sweated labor.

In the second place, the courts have claimed in the exercise of their powers of review the right to determine whether health and public safety authorities have acted within their jurisdiction, even where such jurisdiction has been dependent upon the existence of states of facts the existence of which can be determined only as the result of investigation by scientific experts. Thus, for example, a board of health may have the right under the law to kill all horses having glanders. They examine certain horses by their experts, and determine that these horses have glanders. The

court, in a suit for trespass against the health officers, determines by a jury that the horses did not have glanders, and gives judgment against the health officers. (Miller *vs.* Horton, 152 Mass. 540.) In one rather famous instance the case as reported would seem to show that the jury determined that the disease which brought about action by the health officers, that is, anthrax, did not exist, although those officers had, as a result of a bacteriological examination, reached a contrary conclusion. (Lowe *vs.* Conroy, 120 Wis. 151.)

If the courts exercised with great freedom the powers which they thus claim, an effective health administration would be impossible. Fortunately, they do not do so. On the contrary, they are very apt to regard the action complained of, except in somewhat extraordinary and aggravated cases, as within the jurisdiction of the health or other authorities. (*Cf.* Raymond *vs.* Fish, 51 Conn. 80; Salem *vs.* Eastern R. R. Co., 98 Mass. 431.) Once that is admitted, there is no remedy open to the individual. He is almost an outlaw. Alterations in his property involving great expense may be ordered, although he has never had an opportunity to be heard. (Health Dep't *vs.* Trinity Church, 145 N. Y. 32.) He may be deprived of his liberty on the supposition that he has a contagious disease which, as a matter of fact, he may not have. His children may be torn from his arms and placed in a pest house. (Hoverty *vs.* Bass, 66 Me. 71.) And in no case does he have anything in the nature of an effective remedy.

The courts usually justify their decisions as to the remediless position of the individual in these cases by calling attention to the necessity of haste, and the consequent impossibility of providing a hearing. The argument is valid with regard to cases of infectious disease, impure food, and a series of similar matters. It is not valid, however, in cases such as the reconstruction of buildings which, when erected, conformed to the law. But in such cases it is commonly the rule that no hearing is either provided by law or granted by police authorities. Cases are too common where orders are issued by health or other police authorities, compliance with which involves the expenditure of large amounts of money, where the house owner has never had the slightest opportunity to be heard and first learns of the proceedings through the service on him of the order. Instances, furthermore, are not uncommon

where the order is accompanied with a list of firms who will be glad to compete for the contract necessitated by the doing of the work called for by the order.

Practically the only effective remedy which the individual has in these cases is an injunction to restrain the enforcement of the nuisance removal order. In these injunction proceedings a number of questions may be raised. In the first place, the constitutionality of the law under which action is being taken may be inquired into. In this respect the judicial control is, in my opinion, as I have indicated, too extensive, since as a result legislative discretion is subject to review. In the second place, where the action complained of is not clearly within the authority of an admittedly constitutional statute, its reasonableness may be questioned. This is, as it should be, if no other means of review is provided.

The appeal thus provided against the reasonableness of administrative action is not, however, nearly so effective as it appears to be at first blush.

Its ineffectiveness is due in part to the fact that courts do not care, for fear of a flood of litigation, to entertain any but the most aggravated cases. Furthermore, these cases come before them, to an extent at any rate, prejudged, although the complainant may not have had, and usually has not had, his day in court. He must, therefore, make out a very strong case in order to obtain relief. Finally, these cases are rather technical in character and outside of the ken of judges whose main work is the application of the rules of law governing the relations of private individuals, one with another.

I have said that the only practical remedy is the injunction. It is, of course, true that the individual deeming himself aggrieved in those cases has, theoretically at any rate, the right to sue the offending administrative officer for trespass after the order complained of has been enforced, and that where disobedience of an administrative order is punishable criminally he may refuse to obey the order and, when prosecuted, put up his defense. In both these cases about the same questions may be raised as may be raised in the case of the injunction. As a matter of fact, however, the civil remedy in damages is of little practical use. Judgments against officers rarely have any great pecuniary value. As

for the defense in criminal proceedings, while it may be desirable that it be available, it is not, any more than the action in damages, of great practical value. For few people like to take the risk of criminal proceedings.

Finally, in both the civil action in damages, and in criminal proceedings, the attitude of the court, certainly so far as the legal questions raised are concerned, is about the same as in the case of injunctions. The case comes to the court prejudiced. The only amelioration of the lot of the individual is to be found in the attitude of the jury, which is apt, as has been said, to consider private rights rather than social interest.

*3. Administrative Decisions Affecting Privileges.*

So far we have confined our consideration to cases where private rights have been involved. There is, however, a large number of very important cases where privileges, as the law regards them, rather than rights, are in question.

Most of the cases involving privileges, the exercise of which is dependent upon administrative decisions, have probably arisen under the federal government. There is, however, one rather large class of cases which are regulated by state law. These cases have to do for the most part with licenses which permit the individual to do what would be illegal did he not possess such a license.

In general, there are two lines of decisions in the states with regard to this matter. One holds that the legislature may not constitutionally provide that the grant of a license to do a thing which, without such a license, would be illegal, shall rest in the arbitrary discretion of an administrative authority. These decisions hold that the legislature must lay down in advance the conditions which must be present in order that a license may or may not be issued, and declare unconstitutional license laws which do not contain such conditions.

The other line of decisions takes the contrary view and regards as proper laws which place the licensing power in the discretion of administrative authorities. The decisons of the United States Supreme Court adhere to this view. (Wilson *vs.* Eureka City, 173 U. S. 32.) They hold that the due process of law required by the Fourteenth Amendment is present where administrative authorities have complete discretion in license matters.

The protection accorded the individual by the first line of decisions is not, however, nearly so great as it would at first appear to be. For there has not as yet been developed in our law an effective remedy against the use of discretionary power by administrative officers through the exercise of their power to render mere decisions. It is, of course, true that under the first line of decisions no person can be criminally punished for acting without a license where a statute which requires a license attempts to give complete discretion to licensing authorities. That is, he may transact the business without a license and, when prosecuted, set up as a defense the unconstitutionality of the law requiring it. But it is to be remembered that where administrative discretion in the issue of licenses is in theory limited, there is seldom an effective remedy where the license is refused, because of the decision of the licensing authority that the conditions necessary for the grant of the license are not present. Thus, take the case of liquor licenses which are to be granted only to persons of good moral character, or on the application of a certain number of reputable persons. The refusal of the issuing authority to grant the license because of the character of the applicant or his sponsors is seldom if ever reviewable by the courts. (See Devin *vs.* Belt, 70 Md. 352; United States *ex rel.* Roop *vs.* Douglas, 19 D. C. 99.) Take, again, the case of the grant of a license to practise medicine or dentistry to every graduate of a reputable medical or dental college. The refusal to grant the license to a person on the ground that he is not the graduate of a reputable institution may not usually be judicially reviewed. (People *ex rel.* Sheppard *vs.* State Board, etc., 110 Ill. 180.) Indeed, it may be said that almost the only cases in which the state courts will review the determinations of licensing authorities are where those determinations are clearly opposed to the admitted facts, or have without question been made as the result of the abuse of discretion. Such cases as have been decided, furthermore, have come up commonly on demurrer which has admitted the alleged abuse of discretion. (See Illinois Board, etc., *vs.* People *ex rel.* Cooper, 123 Ill. 227.)

The courts have exhibited this reluctance to exercise a control over the discretion of licensing authorities in the issue of licenses, although it is seldom the case that licensing laws provide for anything in the nature of a formal hearing for the applicant for a license.

In the case, however, of the revocation of a license other than a liquor license, the courts usually insist that the person whose license is to be revoked must have a formal hearing. (City of Lowell *vs.* Archambault, 189 Mass. 70.) There is ε case in the New York courts, however, which holds that a license to sell milk could be revoked without notice or a hearing. (Metropolitan Milk and Cream Co. *vs.* City of New York, 113 App. Div. 377.) But the facts showed that the person whose license had been revoked had been several times convicted for selling impure milk. The court, therefore, refused him a peremptory mandamus to compel the licensing authority to rescind its action in revoking the license.

I have said that the most important cases with regard to privileges have come up in connection with legislative acts of the federal government.

These cases have had to do with the immigration of aliens, the importation of forbidden products, the public lands, military pensions, and the use of the mails. The United States Supreme Court has in its decisions recognized a very large power of uncontrolled discretion in administrative officers. It has thus accorded to administrative officers the right finally to determine whether an alien immigrant may lawfully enter the United States (Nishimura Ekin *vs.* United States, 142 U. S. 651), whether imported teas come up to the required standard (Buttfield *vs.* Stranahan, 192 U. S. 470), whether a person of Chinese race was born in the United States and is, therefore, a citizen (United States *vs.* Ju Toy, 198 U. S. 253), whether a person is making unlawful use of the mails (Bates & Guild Co. *vs.* Payne, 99 U. S. 106; Public Clearing House *vs.* Coyne, 194 U. S. 497), and whether clearance papers shall be issued to a vessel sailing from a United States port where it is alleged that the officers of such vessel have violated a law of the United States and refused on demand to pay the fine appended by law to such violation (Oceanic Steamship Co. *vs.* Stranahan, 214 U. S. 320).

Almost the only instances in which the Supreme Court has not regarded as final the action of administrative officers acting in these cases are where they have exceeded their jurisdiction, *e. g.*, by attempting to exclude as an alien one who was not an alien (Gonzalez *vs.* Williams, 192 U. S. 1), or by denying to a person the use of the mails for a reason not provided for in the law

(Magnetic School of Healing *vs.* McAnnulty, 187 U. S. 94). In some of the cases the court has recognized the finality of the administrative determination as to mixed questions of law and fact as well as to mere questions of fact. (Public Clearing House *vs.* Coyne, 194 U. S. 497.)

The result of our investigation would seem to be, then, that although under the American law individuals may be more than amply protected in their rights against unconstitutional legislative action, they are very largely left to the tender mercies of administrative discretion in the case not only of their privileges, but as well of the rights recognized as theirs by the constitutional bills of rights. American law has not as yet devised effective remedies against administrative discretion. Nor has it provided a system of administrative procedure in these matters which assures to the individual a hearing before orders are issued, compliance with which involves the incurring of great expense.

The unfortunate position in which the individual is placed over against administrative authorities is a continual source of corruption. Where he has no right to a hearing and no effective judicial remedy, it is almost certain that there will be many cases in which the inspectors upon whose report orders to be summarily executed are issued will be paid to report conditions not as they are, or will extort blackmail from the individual before they will report those conditions as they are. The danger is all the greater in this country because of the incapacity and lack of character of many of the employees in the civil service of our cities, where the conditions are such as to demand more than elsewhere administrative regulation and control.

The unfortunate position in which our people are thus placed is one in which they should not be placed. It is due to the primitive character of our legal system. In both England and on the Continent the change in social conditions which has taken place in the last century has resulted in the adoption of proper administrative procedure and of adequate judicial remedies. A study of the recent development of the administrative law of Europe would reveal the fact that we have much to learn as to the protection of private rights from countries like France and Germany, which we are accustomed to consider as not particularly solicitous for individual liberty. The law of these countries has not, it is true,

subjected in any large measure legislative discretion to judicial control. It has, however, given to the individual a protection against the arbitrary exercise of administrative discretion for which we look to our law in vain.

What has been said is particularly true of the French law, which has, through the recent decisions of the Council of State—the highest of the special administrative courts—the peculiar contribution of France to the science of administrative law—a remedy against administrative action which surpasses in effectiveness any remedy which can be found in other legal systems.

It is greatly to be regretted that in our system of legal education there would appear to be at the present time no place for the serious study and investigation of these and similar legal problems. What seems to be needed is that somewhere in the United States, preferably in connection with some one of our universities, there should be established a school or department not for the education of lawyers for the practise of the law, but for the study of jurisprudence, in which greater attention might be given than is now possible to the solution of the many legal and political problems which the great changes in our economic and social life are with increasing emphasis bringing to our attention.

## VI.

## SPEECHES AT THE BANQUET

The annual banquet of the American Bar Association was held in the Gold Room of the Congress Hotel, Chicago, Illinois, on Friday evening, September 1, 1916. Elihu Root, the retiring President of the Association, presided.

THE TOASTMASTER: Gentlemen, please rise and join in drinking a toast: To the President of the United States.

Now, I ask you to join in another toast: To our sister self-governing nation, the Republic of Argentina, whose ambassador was to have been with us tonight, but he was prevented by imperative engagement at the last moment; and to the Dominion of Canada, the President of whose Bar association honors us now by his presence.

*Gentlemen of the Bar Association of the United States and Our Guests:* The position of an outgoing President of the American Bar Association who has to make the very few remarks incident to presiding over your annual banquet just as he is leaving the stage and, shorn of all his borrowed trappings, retires into obscurity, reminds me very much of an incident which occurred along in the middle of the last century in our New York Court of Appeals. The son of Martin Van Buren—Prince John, as he was affectionately called—was on his own merits and without advantage of parentage a very able and distinguished advocate. He was of counsel in the then famous Forrest divorce case. When the case came on to be argued in the Court of Appeals he was for the appellant, and he made some comments upon the conduct of Judge Duer, who tried the case in the lower court. Judge Davies, who was presiding in the Court of Appeals, rapped on the desk and said: "Mr. Van Buren, the Court will hear no imputations upon the learned judge who tried the case below." Van Buren replied: "May it please your Honor, there are some observations upon the conduct of the learned judge who tried the case below which I deem it my duty to make, and I shall make them if I do it going over the bar."

In the prosecution of this Parthian performance I wish first to express in behalf of our Association grateful appreciation for the friendliness, the kindness and the hospitality of the City of Chicago. Chicago: her heart is as great as her park system; her sympathies as fresh as the lawns and foliage which surround her; in the clear processes of her intelligence the wind blows always from the Lake.

I must also specially acknowledge the courtesy and the friendship of the members of the Illinois State Bar Association and of the Chicago Bar Association. To their stimulating comradeship we are greatly indebted.

To the ladies in the gallery—in the girliry: You have had the inestimable privilege of observing our conduct; you have had the opportunity to count the hairs of our heads; you have seen that we were simply boys here with the honest, sincere and friendly hearts of the youth whom some of you knew first years ago. Deal kindly with us in the morning.

To the casual observer, who from time to time has stepped for a few minutes within the doorway where our meetings have been going on or has read the abstracts in the papers: You have seen that we have been criticising the habits, the conduct, the methods, the practices of the American Bar and the American people; you have seen that we have been putting our fingers on defects here and there, finding shortcomings here and mistakes there; but make no error. Notwithstanding all our criticisms, we are equal to the job. We are the lawyers of a people competent to maintain their nationality, their virility, their independence and their honor for many a long century to come. We are the same people who braved the perils of unknown seas, who fought the savage, who felled the forests, who crossed the mountains, who broke the prairie, who turned the vast wilderness that is now the United States into a nation that is one of the wonders of the world. It is not pessimism, it is not faintheartedness; it is the process of free government, that we have been going through.

It is not the business of a toastmaster to usurp the functions of the speakers of the evening. No, no. I wish to say that this is to be a short dinner, half-past ten is the time we aimed at to finish, and, if we should overrun that, understand that at eleven

o'clock the strike order goes into effect. You can break up into independent nebulæ and star clusters after that hour, but no more this universal company after such time, between half-past ten and eleven, as we are able to finish.

I wish to say before yielding the floor that a piece of very pleasant information has come in tonight by a telegram from Senator Overman, of North Carolina, to Mr. Shelton, the very able Chairman of the Committee which has been urging in behalf of this Association the passage of a law conferring upon the Supreme Court of the United States the power to make rules in common law cases as they do in equity cases so that there may be uniformity of practice, and so that there may be intelligent exclusion of undue and injurious technicalities. For many years this Association has been urging such a law upon Congress, and at last Senator Overman telegraphs that the bill has passed both houses of Congress.

Chicago, in her high appreciation of our merits, has sent to speak for the Chicago Bar Association and for the State Bar Association her best—the wisest, kindest, most esteemed and beloved—Judge Cutting.

## RESPONSE OF CHARLES S. CUTTING.

*Mr. Toastmaster, Ladies and Gentlemen:* The awful handicap of such an introduction bids me to say that this postprandial arrangement must have been modeled after the dinner which we have just been eating. You have now progressed to the soup course, but shortly you shall have the squab and the spring lamb.

I have fully appreciated, as you have, the remarks of the retiring President as to our ability to criticise ourselves. I am disposed tonight, just in the most friendly possible attitude, for a moment to analyze a little of the judicial attitude which I have observed during this convention. I was ushered into the ceremonies of this most auspicious occasion by attending a dinner at which judges were almost exclusively the speakers. If one were to characterize it, I feel confident that he would have called it a symposium of humility. As a somewhat facetious friend of mine

from an adjacent state remarked, you would have thought from the statement there made that you were in a political convention immediately preceding a judicial election. But such was not the case. Surely no man in this audience would presume to criticise those things which were said of our profession by our President. He is a technicality hater. Every profession has its pet aversion. There are some things which the physician, the theologian, and the lawyer always despise. The theologian doesn't like to hear very much, except from his fellows, about creeds. The physician is more or less sensitive on the subject of pills. And we lawyers are always a little bit nettled by the suggestion of technicalities. Now, by all means, let us do away with technicalities. Our courts have said again and again that they will not reverse upon immaterial technicalities. We have legislated them out of existence. It was suggested—and that is what I am coming to—that in all human probability it would require a "gentlemen's agreement" among us lawyers to eradicate the technicality from our practice. I would like to go back and emphasize the term "*gentlemen's* agreement"; and not only that, but I beg to call your attention to the fact that when we shall have rejuvenated the Bar from its foundation up and when "*gentlemen*" would need no emphasis in a company of lawyers, we shall get better results from that remedy.

But I thought I would see what a technicality is. The dictionaries do not define, except to say that it relates to those things which are technical. I looked over one or two decisions of Supreme Courts, and one of them says—and it is our own Supreme Court, by the way—that it is error in an instruction to a jury to inform that jury that the law does not favor extreme technicality; because, they say, extreme technicality has no settled and definite meaning. And I suppose, too, as a judge in the Supreme Court of Indiana says, that merely abstract and practically harmless errors are those meant by their statutes which provide that there shall be no reversals for technicalities.

And a very learned judge from Georgia said, in talking over the proposition, that unless the forms of law are really carried out chaos will result and that the technicality is an absolute

necessity. Therefore, you see able jurists do not always agree—which is a curious circumstance in our profession. So with that same fear and trembling which the man had who drove his new automobile out on a country road for the first time, trembling for fear he would puncture his tires on the road tacks (tax), I undertook to find out a little more about technicality, and all at once I had a recollection, I remembered something. Once upon a time, as we begin fairy stories always, I sat upon the Bench. It is so long ago, though I haven't forgotten it I trust you have. We were endeavoring to find out what had become of some property which had been given into the hands of an executrix, and we found that the conduit which had taken the property out of the executrix' hands was husband of the aforesaid executrix; whereupon he was placed upon the stand and sworn and examined. It was alleged that there was a conspiracy between the two to loot the estate. The gentleman on the stand, who was of a very dark, brunette hue—he was born in Mississippi and he came from Tupelo—undertook to explain the situation. He was proud of the fact that he had a license as a stationary engineer, was a graduate of a technical institution, and, he said, there is no sort of an agreement between this woman and me; in fact, I don't think I am going to live with that woman any more. She is ignorant and I am an educated man; the fact is, Judge, she is a domestic, and I'm a technicality.

That is the only definite, concrete definition of a technicality that I have been able to find. It is a short, stocky, curly-haired, dark-complexioned negro from Mississippi. That is what a technicality is. But it is not the only sort. A technicality is a most insidious microbe, and I am opposed to him all the time and under all circumstances. But, alas! we cannot always distinguish him, for he has no stamp upon his back. He has peculiarities. He loves, I think, wood because certainly he bores into the Bench. He has bibulous tendencies, for he fattens at the Bar. And certainly his literary tendencies are tremendous, for he so insinuates himself into the briefs and the records that go to the Supreme Court that you find him there by myriads.

I am going to add to the remedy which the distinguished gentleman who presides over this gathering has suggested for

technicality, viz: that the courts of review cease to recognize him when they see him and that they put the stamp of their disapproval upon this strepticoccus that seems to be microscopic in our method of litigation. If we can get that done, then we will have an agreement to overlook them when we see them at Nisi-prius. But they have unfortunately gotten into our courts of last resort; for it is said that, in looking over complicated records, where the scales are nicely balanced as to just where the law of the case is, sometimes even they welcome this little microbe, if they can find him, to let them out of a long and difficult research; and they reverse, or affirm, on the basis of the technicality that has come to their rescue. Of course, this may be unauthentic. I trust it is; but so is it said among men.

But, gentlemen and ladies—let me reverse that proposition—ladies and gentlemen; for what I am about to say is a *nunc pro tunc* statement. It is not only the duty of the Chicago people who have invited you here and have been delighted with your presence, to welcome you to this city, but also to speed the parting guest. It would be possibly more fitting to do that at the end of this banquet than at the beginning of it. But, of course, you cannot have everything. The man that is only capable of opening a banquet, under no circumstances should be asked to close it. Therefore, just take this *nunc pro tunc*—not now for some time in the past, but now for a little time in the future. We have been, as I have stated, more than delighted with your presence here. You are our guests, and we hope that you have been pleased with us. We are fairly patriotic here in the matter of love for our City of Chicago, with all its defects perhaps, but with its many excellencies as well; and we hope you have liked us and our city, and, if you have, under the circumstances which have surrounded you, with the sword of Damocles in the form of a railway strike hung above your heads during the time that you have been here, you would certainly enjoy us under normal conditions; and when you go from us, as you will, not speedily or hastily, as we hope, you will take with you the evidence. When the jury retires it will go away with all the instructions of the court, the evidence in the case and its own observations. And when in the quietude of your homes you have made up your

verdict, we trust that upon the count in the indictment which has charged that we were not attentive and that we have been derelict in some direction, we shall be found not guilty; and that upon the count which charges good will, good wishes and hospitality, we shall be found overwhelmingly guilty. And after the verdict has been rendered, ladies and gentlemen, we trust that the judgment which you will pass thereon will not only be just, which it must be, but that it will be tempered with that mercy for us which we crave humbly at your hands.

THE TOASTMASTER: I am sure that if ever in the future we have a new trial ordered we shall wish to have the venire laid in the City of Chicago.

Many good Americans in talking about our neighbor on the north have thoughtlessly said very foolish things. You and I know, everyone who really tries to understand the heart of the American people knows, that yonder across the border where justice is maintained, rights are secured and injuries redressed according to the course of the common law, the people of the United States can breathe freely. Our habits of thought, of action, our instincts, all the tendencies of our lives, are at home for free development there. And there are few things in which the people of the United States take greater pleasure and pride than in the splendid development of the new nation which has grown in these later years across the border line and stretching through to the snows of the Arctic. Our brethren in the profession in the Dominion of Canada, our brethren in the universal effort to make justice prevail on this western continent, have sent to us to speak for them the president of their young Bar association; and with respect and esteem and fellowship we welcome Sir James Aikins, the President of the Canadian Bar.

## THE RESPONSE OF SIR JAMES AIKINS.

*Mr. President, Ladies and Members of the American Bar Association:* On behalf not only of the Canadian Bar Association, but of the people of Canada, let me express to you our thankfulness for the kindly way in which you have received us today. We thank you for the expression of your regard. We are but young

and therefore perhaps a little shy. The ladies in the gallery will appreciate the position in which we are, when I say to you our regard is mutual.

The highest compliment that could be paid to the American Bar Association by the lawyers of Canada is the compliment of imitation. You honored Canada only a few years ago by having your annual meeting in the City of Montreal. The immediate effect of that was, that the barristers of the Dominion of Canada, considering what this intelligent body had done for the United States, thought that the Bar of Canada could do it for the young Dominion; and so the Association was formed.

The small boy in a well-bred family where harmony prevails looks up to his elder brother with a feeling of pride and sense of security. He admires his tough thews, he hangs on his wonderful words and boasts of him, when he is not present, to others. And it is thus that the Canadians regard the people of the United States. We do not tell you of your greatness, for we have heard addresses that have been delivered on your national occasions and speeches that have been made in election contests; we have also read your literature, and we have come to the conclusion that the people of the United States have a well developed national consciousness.

I mean by that that you have pride in your country; you love your institutions; you are proud of your people. If it had not been for that national consciousness you could not have the unity, the strength and the progress that has characterized your nation, without it you would not have been able to persuade or conscript the multitudes that have come to you from other nations into the ranks of your workers and your thinkers, and even of your idlers.

We in Canada hope to fully develop that national spirit, the consciousness of nationhood, also.

It is being stimulated by the terrific war in which it, with other nations, is engaged. Canada does not consider at this time of struggle in which such issues are involved, that the things which it possesses or even the numbers of its population are of greatest importance, and so it places upon the altar of sacrifice its millions

of men and its country's credit, a wealth representing the labor of the past, and a discounting of the toil and labor of its people in the future. While 350,000 of our best and bravest sons of a free Canada, along with the sons of other free nations of the British Empire, in its defense, are daily yielding up their lives to save our nation, our Empire, and the civilization that it represents, they count their lives not dear unto them. So Canada, while losing its life in one sense for such a cause, is saving that which is most precious in individuals or nations, its own soul. Our people are being

> "Heated hot with burning fears,
> And dipped in baths of hissing tears
> And battered by the shocks of doom
> For shape and use."

That spirit which has developed into your national consciousness was nascent in your forefathers, those adventurous and strong characters, who, like Abraham, heard a call to go out into a place that they should receive as an inheritance, with the promise that there should be made of them a great nation, and that nation would be made a blessing to the world. That spirit which saw the vision, and obeyed the call, sustained them in their adversities, helped them in this new land to nurture the roots of that parent vine, a branch of which they bent across the ocean as they came, and which dropped in this new country its fruits of British law, British principles of government and institutions. It was that spirit that prepared them and their descendants for self-government, and to resist encroachments upon that privilege. This that imperious and short-sighted Hanoverian King George III saw, and called them "rebels." He wrote to his ministers: "All men feel that the fatal compliance in 1766 (the repeal of the Stamp Act), has increased the pretensions of the Americans to absolute independence."

It was of him that Greene, the historian, wrote, "The shame of the darkest hour of English history lies wholly at his door."

It was possible, and in some countries may still be possible, for a crowned head with autocrats around him to disturb the peace of nations and the quiet progress of the people.

George III thwarted the efforts of Chatham and his supporters; ignored the petition of the people of London against any breach with the Americans; set at naught the desire of the British people generally, and what is more, of Washington and the other loyal British hearts on this continent who wished still to rest beneath the British vine and to enjoy upon this continent the freedom for which their British fathers' blood was shed.

It was then that your forefathers, still influenced by that spirit which developed into your spirit of nationhood, tore from the parent vine the branch and sufficient of its roots to grow in this new land. It has covered the land, and under its umbrageous protection people have come from everywhere to abide without fear.

And let us hope that, like the tree seen by the Prophet of Patmos, planted on either side of the river, its leaves also should be for the healing of the nations.

Let me say, without any reference to the present war, that a great nation like the United States cannot fulfill its destiny and stand aloof from the life of the nations. Had it not been for the stupidity and obstinacy of that Hanoverian monarch, had Chatham retained his vigor, and the voice of the people been heard by the British Government, there would have been no War of Independence, the central authority of the British Empire and of its surroundings might have been transferred with quiet procession under the protection of a fleet which kept free the highway of the seas, protection across the ocean and established in the very center of this continent. From it a voice of power might have been heard saying to the warring nations, "Peace! be still!" and there would be a great calm.

The roots from the same parent vine have spread to Canada, and another branch of it is bending over us bearing the same fruit—civil and religious liberty, self-government, British laws and institutions.

Gibbon says: "A country's laws are the interesting part of its history."

Another writer says, "Tell me the laws of the country and I will tell you the character of the people and their history."

Accordingly, a deep student of history studying the laws, as they were originated and grew in America and the laws as they

grew in Canada, and as they now exist, will see reflected in history's glass the unmistakable likeness and features of the older brother and that small boy—the younger brother, each possessing the same spirit and moved by the same desires, working for the same purpose, to bless the people of each jurisdiction and be a benediction to the world. True, we differ in respect of the head of each government. In Canada we have a king—the King of Canada is also the King of England, and the King of each of the other British nations. He is an idealistic king. Transcendental powers and perfect attributes always envelop the reigning monarch, but his discretionary powers of government are limited by the laws the people make.

Fortunately, our crowned sovereigns within a century have possessed fine personal characters: Victoria the Good, Edward the Peaceful and George V, who is doing all in his power to help the Empire in its struggle by his example, his kindly thought and deed. But be that character what it may, constitutional government moves on at the will of the people.

Its transcendent sovereign is in theory always present in the court of justice, but the peoples' elective representatives appoint the judges.

In theory he commands everywhere his armies, but the people raise the armies, support them and appoint the commanders.

In his name statute law is made. It bears the caption: "His Majesty by and with the advice of the Parliament enacts as follows." Because the King acts upon the advice of ministers directly responsible to the people, by a fiction he can do no wrong.

Because we have such a transcendental King with such superhuman attributes, the government in Canada approaches a theocracy in theory, but in practice is a pure democracy.

Do such attributes as these belong to the Presidents of the United States? Thoughtful people outside your nation marvel at the fact that you have selected such a line of competent and worthy Presidents, men of integrity and men of wisdom.

When one reads your papers and the speeches of your election orators, one can only come to the conclusion that about half your people only think the President can do no wrong.

As the common law and equity were born out of the needs of the people, the birth of new law continues the same. To meet their

conveniences and needs the people act, action passes into custom, and custom into law, though now it takes the form of statutory enactment.

The law in Canada and the United States sprang from a common source. The needs and conveniences of the American people and the Canadians will be the same. We, therefore, may expect a similarity of law. There is, therefore, no reason why these two nations should in spirit and in purpose grow farther apart. In respect of the sovereign power of each nation there needs be a complete separation to ensure it.

Between Canada and the United States there is an invisible and impalpable boundary line which a breath of hostility could bend or blow away, but because it is guarded by honor, the truth and justice of the United States and Canada, it is in the thought of both a great gulf fixed, a barrier as high as heaven and as impenetrable as adamant. But until, from these two nations, faith departs and honor dies, no battleship need watch nor cannon protect that boundary. Truth must ever remain the same in both countries, though customs may differ.

> **Let us not forget:**
> **That all but truth is changing day by day,**
> **He who breathes on man the plastic spirit**
> **Bids us mould ourselves our robes of clay;**
> **Old decays but foster new creations,**
> **Bones and ashes feed the golden corn.**
> **Fresh elixirs wander every moment**
> **Down the veins by which the live past**
> **Feeds its child, the live unborn.**

Canada wishes that there be entente cordiale existing between the American and the Canadian Bar, and then an entente cordiale will be maintained between our nations.

THE TOASTMASTER: A small and inconspicuous testimonial of the good will of the people of Illinois to the American Bar may be observed in their gift to the American Bar Association of a Chairman for our General Council. There is no intoxication in the air of Peoria, and the people of that city must be serenely content in the possession of a guide, philosopher, friend, defender and advocate in the great, strong personality of George T. Page, whom I now present.

## RESPONSE OF GEORGE T. PAGE.

*Mr. Toastmaster, Ladies and Gentlemen:* There is an old adage, which I think had its origin in the Scriptures, that money is the root of all evil, but since coming to this meeting I have found that for the American Bar Association, Elihu is the Root of all good.

I do not understand what sort of mental aberration, temporary or otherwise, inspired the maker of this program to choose a man who has had an impediment in his speech since his youth, to follow after this bouquet of eloquence that has preceded him. We have now arrived at the squab. I trust that those having their menu cards before them will notice that it is a Royal Jumbo Squab in Cæsar's Rôle.

I trust that you will all pardon me for a criticism upon the frightful table manners of the diners at this banquet. You made an outrageous amount of noise in taking that soup (Judge Cutting). I do not propose to continue what I have to say very long, because if the Chairman of this meeting tilts the plate at half-past ten as he threatens to do, that nut down at the other end will roll off and nobody will get it.

I have always heard that good things are done up in small packages. That being true, I am not at all astonished, even after looking at this vast audience, to find that the better half is in the small "girliry" above us. Somewhere I have heard—I think several thousand times—that "man is but little lower than the angels." But what I cannot understand is the perverseness of Fred Wadhams in making the members of the American Bar Association persist in their fallen estate and dine alone, when the angels want to come down to us.

Now, I am from Peoria. There is no infectious spirit in the air down there. We keep it in barrels and bottles. One is before the Chairman now. I do not make this announcement that I am from Peoria in any boasting spirit, but I make it at the request of Judge Cutting. Chicago is a great city and this is a great hotel. Several members of the General Council wanted to go to what they call the Irish Room—excuse me, the Green Room—which is

over in the corner there, and there is a stairway leading from the bar up to the Green Room; but when I went to the desk and asked the room clerk how to get to the Green Room he told me to go down to Jackson Park and follow up the street car tracks and I would get there. Chicago is built exactly on that scale. We were taken out to a country club. I rode with a gentleman from Chicago and another gentleman from Rockford, and we had to appeal to the man from Rockford to show us the way because the man from Chicago didn't know it, which shows what a tremendous scale Chicago is built on. Chicago, the city, is built upon the men of Chicago, who have been big enough to make it.

I want to say to you, if any of you don't just know where you are now located with reference to Peoria, that you are 160 miles northeast of Peoria; but I am not a corporation attorney and I will not name the railroads by which you can get there.

Now, a serious word. We are at the close of what I think is in many respects the most remarkable meeting the American Bar Association has ever held. It has been made most remarkable by the splendid utterances of the President of this Association. But, gentlemen, the closing of this session is not a closing of the work of the American Bar Association, I hope, for this year. We are merely "rookies" getting our camp training; we are merely here under our officers and leaders getting that instruction which will enable us to go ahead, and, I hope, to some extent carry out the high purposes that have been sounded as the keynote throughout all this meeting. If we are to forget what we have heard here, if we are not to go home and make these splendid ideals a part of our lives, a part of our purposes in the years to come, then the work of this meeting is in vain and it will have been almost useless for us to have been here. The criticisms that we are making upon the laws and upon the methods of procedure are not mere faultfindings of men who want to criticise, but they are the struggles of free men who want to work out for the liberties of the whole people the high purposes of the Constitution of the Union and the constitutions of the states. It is not boys' play, it is men's work. While a splendid logician like Mr. Root may be able to phrase these high thoughts for us and point out the way, the only method by which any good can come from them

is for us to go home and make them living and vital forces in ourselves and in the communities where we live.

This, I have said, has been a remarkable meeting. It has been a remarkable meeting not only because of what has been said and done here, but it has been a remarkable meeting because of the conditions which exist throughout the world and throughout this country today and which confront us as problems that must kind and another. I hope that our fears for the future will prove to be largely ungrounded, and that no overt act of war will happen to justify the precautions which so many men in this country feel it is necessary for us to take. There may hereafter be battles at some Gettysburg, at some Shiloh or at some Appomattox, but if there are, those battles will not be won or lost upon those fields; they will be won or lost as we make our daily lives between now and the time when those events shall happen useful or useless. It is for us to build up physically and mentally and morally every man, woman and child in this country, and to build up every institution in this country, so that whatever may be the vicissitudes of time, whatever the great difficulties which we shall be called upon to meet, the free people of the United States will be ready to meet them, man to man, and overcome them.

If we can work out these purposes for ourselves and for our families and for our country the American Bar Association will have accomplished a greater good than has ever been accomplished by any other organization in the United States. Let me venture the hope that when we come together again next year many of these high purposes will have been accomplished in fact, and that we will meet ready to go forward in the doing of a greater and a better work in the years to come.

THE TOASTMASTER: There was a time when the city of St. Louis considered itself a rival of Chicago. It may seem to some of you that she has abandoned her contention. Not so. She rests serenely in that superiority which consists in the possession of our loved, our honored and much respected friend, Frederick Lehmann, whom I now present to the universal and old friendship of this company.

## RESPONSE OF FREDERICK W. LEHMANN.

*Mr. Toastmaster, Ladies and Gentlemen:* Permit me first a word of explanation and vindication. At an earlier stage of the meeting of the Association I had occasion to make the statement, based upon a tradition current there, that the honored President of the Association, Mr. Elihu Root, was at one time a resident, and a member of the Bar, of the State of Missouri. That statement has been challenged by some dry-as-dust chroniclers of mere facts, who looked into "Who's Who" and found no verification of it there. And it has even come to my ears that the gentleman himself said that my statement, as Mark Twain said of the report of his own death, was grossly exaggerated. Since making the statement, however, I have had ocular and auricular demonstration of its truth which I present for your consideration. We have known the gentleman in the years that have passed and have seen him making his addresses, cool, calm, collected and imperturbable, a great intellectual engine, moving without tremor in its structure, with power and precision to its end. And that we said was the product of New York. But on yesterday we observed him as a very different being, when the report in favor of a reform of judicial procedure was under consideration, and met with attack from every quarter until it seemed doomed to overthrow. But opportunely Mr. Root came to the rescue. And what a transformation we beheld. Not cool, not calm, not collected and not imperturbable, but his face flushed with earnestness of purpose, his frame vibrant with nervous excitement, every sentence throbbing with emotion, and his voice—why it penetrated to the remotest precincts of this great caravansary, even to the green-room and to the tap-room; and, like a blast upon Roderick's bugle horn, it brought a thousand clansmen to his rescue. Moving like an engine? Yes; but now it was a duplex engine. It was heart working with head, compelling conviction, and the report was saved without the help of the gavel. That voice and that manner of yesterday were born and bred in Missouri.

I want to say a word in passing to our friend from Canada. The greatest good we can hope for at the present time is that we shall have relations as cordial and secure with our neighbor upon the southern border as those we have with our neighbor

upon the north. Venturing not to look into the future with certain eye, of this I yet feel assured, that whatever the future relations between this country and Canada may be, they will be determined not by the lust of conquest, but by the love of kindred.

Dick, the butcher, said to his leader in the Cade rebellion, "the first thing we do, let's kill all the lawyers." Cade assented to the programme. When Peter the Great was in London he visited Westminster Hall, and as he came away inquired, "Who and what are the men in black robes who did so much talking?" Told that they were lawyers, he said, "I have two in my dominion and when I get back I shall hang them both." In the social scheme of Jack Cade and of Peter the Great there was no place for the lawyer, but that need give us but small concern.

In the State of Illinois they do not hang the lawyers; they build monuments to them. In the ride along your great boulevard the most impressive thing I saw was the statue by St. Gaudens of Abraham Lincoln, its rapt countenance expressing the heart and conscience of a great nation in travail; the statue of a man who came into the history of the country as the representative of a party and a section and who gave to the country such service and devotion and crowned his service and devotion with such sacrifice that his name has become an inheritance in which every party and every section claims a part.

It was another lawyer who said: "We hold these truths to be self-evident, that all men are created equal and endowed by their Creator with certain unalienable rights, among which are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among men deriving their just powers from the consent of the governed." Upon this principle our government was established, with its powers organized in such form as to give full effect to its principle, agencies to make laws, to construe them and to enforce them, in whose election and appointment every man in the land has an equal share with every other.

We had a great war to determine whether a government so conceived and so organized could long endure. In all the annals of oratory there is nothing more eloquent than the simple, yet stately, words with which Abraham Lincoln dedicated the field

of the crucial battle of that war to the memory of those who there died that such a government might live.

But if it has come to pass, or if it shall come to pass that the representatives of this people, chosen in equal suffrage for the enactment of their laws, may not meet in the council halls of the nation provided for that purpose and freely and without constraint deliberate upon and determine the measures proposed for their welfare, if it has come to pass or if it shall come to pass that the representatives of the people so chosen shall yield their judgment to the dictation or ultimatum of any powers not constituted by our laws nor responsible under them, then "government of the people, by the people, and for the people" will have perished from the land.

THE TOASTMASTER: Senator Sutherland, I now hand to you the insignia of office of the President of the American Bar Association. I transfer to you the right to all the emoluments of the office; I invest you with its powers and dignities. If you serve the Association and the Bar in this new position of duty and responsibility with any approach to the eminent ability, the pure public spirit, and the devotion of character which have given you the highest distinction in the public service of the United States, the Association and the Bar are indeed to be envied.

Commander: I salute you as a private.

PRESIDENT-ELECT SUTHERLAND: *Mr. Toastmaster, Ladies and Gentlemen:* I am bound to confess that I do not recognize myself by the description which your toastmaster has been good enough to apply to me. If I may be indulged for a moment, it reminds me of an incident which happened not very long ago in the southern part of my own state. A man there conceived the idea of becoming a candidate for the office of county clerk. He had not been engaged in politics to any great extent before, and he was naturally embarrassed at his new experience. He selected a distinguished orator to present his name to the convention. The order of business was made up which called for the nomination for county clerk somewhat late in the proceedings, and while the other officers were being nominated he took occasion to go to a nearby bar and stimulate himself for the coming ordeal. Just before that order of business was reached

he went out again for a final drink. While he was gone some of his friends hurriedly got together and concluded that he had made an unfortunate selection in his sponsor, and they selected another man. When the candidate returned to the hall this substitute was in the midst of the usual nominating speech, exaggerated and entirely beyond the deserts of the candidate. The candidate listened interestedly for a moment, and his chin dropped and his face looked solemn, and finally he leaned forward and said to a friend in front of him, "My God! If they have got any distinguished son of a gun like that before this convention I'm gone."

I understand perfectly that I am not expected to make any speech here tonight, particularly in view of the fact that the final moment which the toastmaster fixed in the beginning has almost arrived, and while I am tempted to disappoint you, I am not going to do it.

The action taken by this great Association at the morning session confers upon me not only the greatest honor within its power to bestow, but the greatest honor which can come to one of our profession. I have been looking forward all day to an opportunity to tell you so, but now that the opportunity has come, these poor lips of mine are quite unable to find words of sufficient strength to express to you the deep sense of appreciation which I feel, beggar that I am for words of power and of gratitude. I can, after all, only say I thank you, and that I say with all my heart.

I cannot hope, I do not expect, to equal the brilliant and useful administration of my distinguished predecessor, but what ability I have will be given unreservedly during the coming year to the work of this Association.

It only remains for me to wish you health and happiness and God-speed until we meet again in another year.

## VII.

## REPORT

OF THE

### SUB-COMMITTEE OF THE AMERICAN BAR ASSOCIATION FOR THE AID OF EUROPEAN LAWYERS RENDERED HOMELESS AND IMPOVERISHED BY THE GREAT WAR.

LONDON, August 9, 1916.

*Gentlemen.*—In April, 1915, your committee honored us by a request to distribute the funds so generously given by the Bar throughout the U. S. A. for the relief of our distressed professional brethren in Europe.

On the receipt of this fund we at once announced to the legal and public press, including *L'Independance Belge* published here, that your committee had entrusted us with the distribution of it.

The total sum remitted to us was £2,620 : 0 : 6, and the enclosed account shows how this sum has been dealt with. As all but a very small sum (already allotted) will have been expended by the time the Association meets, we agree with your worthy and energetic Secretary that it is desirable to submit our report now.

It will doubtless be remembered that the fund was originally raised in response to a call from Mr. Cox-Sinclair on behalf of a local English committee (The Belgian Lawyers' Aid Fund) which had already done good work and whose funds were nearly exhausted.

Your response was generous and immediate and in the result, fully exemplified the adage, "Bis dat, qui cito dat." For the need was urgent. By means of your fund we were able to assist that committee from time to time in dealing with a number of deserving cases, and thus save the trouble and expense of taking families from quarters in which they had already been comfortably settled.

These grants in aid lasted for some months until that committee practically ceased its labors, and amounted in all to £409. In the meantime there had also been formed by English solicitors a "Belgian Lawyers' Aid Committee" which was approved by "The Law Society," the body representing English

solicitors. This committee was rapidly coming to the end of its funds, and before a further appeal by them could be responded to adequately there was great danger of many pressing cases being without proper support. We, therefore, consented to assist these cases, temporarily, and in all granted aid to the amount of £147. That committee has received the support of the legal profession, Bench, Bar and solicitors, throughout this country and is now continuing the work.

We also received a request from Mr. Donald Harper for a grant from your fund to a committee of the French Bar, supported by eminent Frenchmen, appointed to assist suffering French and Belgian avocats and avoués in France. After due enquiry and consideration we thought it proper to allow that committee a grant of £600, as they were on the spot and could see to the proper distribution of this sum. The remainder of your fund, £1,474: 15: 1, we have distributed personally after duly investigating each individual case and have in all made grants to no less than 247 persons, being Belgian avocats, avoués or notaires and their families or dependents, including 75 men (1 Russian), 66 women and 106 children—an average of about $28 for each person. Indirectly many others of the same households have benefited by this help to their relatives, being thus relieved from the burden of supporting them. We have been materially assisted in our labors by MM. Charles Bauss and Albert Maeterlinck of the Antwerp Bar, and MM. Gaston de Leval of The Brussel's Bar, who gave us much valuable information.

As to the persons to whom and the circumstances under which this help has been given and the universal expressions of gratitude from all the recipients, we have already submitted some details. But we feel we must record our personal admiration for the fortitude, patience, long-suffering and heroic self-sacrifice exhibited by our confrères from these stricken countries, and by their equally heroic women and children. Fleeing from fire and from sword, and parting from all they hold dear they have borne exile with a calm and uncomplaining spirit that is beyond all praise. In most cases no application was made to us until their own small resources were nearly exhausted. In some there were old and enfeebled ones who yet said: "If there are others in

greater need than us, we will not ask." In many others husbands asked nothing for themselves so long as greatly needed clothing, medicines and comforts could be given their wives and children. In practically all cases the men were anxious and longing for occupation at something, as they felt the deadening effect of idleness. And yet our greatest difficulty was to find or recommend them to occupations—partly owing to their ignorance of English, but also partly to their being unfitted to undertake heavy manual labor in munition works where labor was greatly needed. Some procured clerkships in offices, banks, railroads, some few in munition works, some as translators in the censor's office, etc., so that the drafts on your funds have been less during the past six months than before. Some have found places in France, some have gone to the front or to army positions, some few have returned to join old or dying relatives at home. The family separations have been most harrowing. One poor mother, whose husband was stricken with paralysis and in exile with her in Holland, wrote: "I have eight children and not one of them is with me in my trouble." Recently three young children here were in need and separated from their parents. The daughter wrote us: "Far from our parents and without any communication with them we were in a precarious situation . . . . but by the grace of your generous gift we can await with courage and hope the end of this terrible war. We pray God that he will bless you and your committee for the opportune help which you have sent us."

We have also been able to aid some students in keeping up their studies by the purchase of certain law books. Amongst other interesting incidents, one baby was born during the Zeppelin raid on London last October. In another case a young barrister's wife added to his difficulties as well as his joys by presenting him with twins. In another we sent a wife money to go to France with their little girl and join her husband after two years separation. In others we paid rent to keep the home together; paid for medicines and care after an operation and extra nourishment; and one young soldier avocat at the front in greatest anxiety about his young wife here, we comforted by sending her money for extra comforts during her illness.

In some cases local committees who had granted aid were obliged to curtail assistance owing to lack of funds, and we by giving a comparatively small sum per week to eke out, were able to keep families from moving or separating. In others the local help for food was too little for proper nourishment, owing to the very high price of food recently. By a small contribution from your funds the necessary food was obtainable.

These are but a few of the many distressing yet interesting cases that we have had to deal with, and if your committee had been able to see and hear the expressions of gratitude which we have been privileged to see and hear, they would have been more than repaid, as indeed we have for all the efforts put forth to alleviate the sufferings of our distressed though grateful fellow members of a stricken profession, who have not only to bear the burdens of today, but in many cases have a future that seems all but hopeless to look forward to in rebuilding their homes and rehabilitating themselves in their profession. The English local committees here have done noble work, but with very great drafts upon their own funds, have not been enabled to do all that they wish. We have been able through your generous contributions to supplement their work and provide the many small necessities which make all the difference between comfort and real distress.

At times our labors have been considerable, but since systematizing them, and familiarizing ourselves with the needs of your wards, they have been comparatively light. But it has been indeed to us a labor of love and we shall always look back with genuine pleasure to the help we have been able to give by means of your generous donations.

As our funds were becoming exhausted, we have notified the several applicants that the English committee, called "The Belgian Lawyers' Aid Committee" is again in funds, is well organized to grant the necessary assistance and that further applications must be made to it.

It is impossible for us to convey to the committee the many words of gratitude we have been requested to convey to you by those we have assisted. For the English language does not permit of our fully translating the delicate expressions of gratitude which we have had from them.

No expenses whatever have been incurred except 16s. for revenue stamps on the checks; all else has been paid to the applicants.

**STATEMENT.**

EUROPEAN LAWYERS' FUND.

CREDIT.

| | £ | s. | d. |
|---|---|---|---|
| By remittances from America | 2620 | 0 | 6 |
| By deposit interest | 7 | 13 | 7 |
| By part grant repaid | 3 | 17 | 0 |
| | 2631 | 11 | 1 |

DEBIT.

| | £ | s. | d. |
|---|---|---|---|
| By grants to French committee | 600 | 0 | 0 |
| By grants to Mr. Cox-Sinclair's committee | 409 | 0 | 0 |
| By grants to Belgian Lawyers' Aid Committee | 147 | 0 | 0 |
| By direct grants to 1 Russian and 247 Belgian notaries, avoués and avocats and their dependents | 1372 | 5 | 0 |
| By check books | — | 16 | 0 |
| By balance reserved to meet six recurrent grants | 102 | 10 | 1 |
| | 2631 | 11 | 1 |

WALTER G. F. PHILLIMORE,
J. ARTHUR BARRATT,
*Sub-Committee.*

*July 31, 1916.*

## VIII.

## STANDARD RULES FOR ADMISSION TO THE BAR FORMULATED BY THE SECTION OF LEGAL EDUCATION.

At the meeting of the Section of Legal Education the work of formulating standard rules for admission to the Bar, which had been under consideration for a number of years, was completed and reported to the Association at its closing meeting, and by vote of the Association these rules were referred to the Committee on Legal Education, and directed to be printed in full in the JOURNAL. These rules are as follows:

I. Examinations for admission to the Bar should be conducted in each state by a board appointed by the highest Appellate Court.

II. A law diploma should not entitle the holder to admission to the Bar without examination by this board.

III. The candidate shall on admission be a citizen of the United States.

IV. He shall also be a citizen of the state in which he is applying for admission, or prove that it is his intention personally to maintain an office therein for the practise of the law.

V. Character credentials on application for admission shall include the affidavits of three responsible citizens, two of whom shall be members of the Bar, and the affidavits shall set forth how long a time, when, and under what circumstances those making the same have known the candidate.

VI. Three years' practice in states having substantially equivalent requirements for admission to the Bar shall be sufficient in the case of lawyers from other jurisdictions applying for admission on grounds of comity.

VII. There is no necessity for the insertion in the rules of a reciprocal comity provision; that is, of a proviso prohibiting the admission of lawyers from other states on grounds of comity, unless the state from which the lawyer comes extends similar courtesies to lawyers from the Bar of the state in which the candidate is applying for admission.

VIII. Students shall be officially registered at the commencement of their course of preparation for the Bar, but only after

a report of the State Board as to fitness, based upon its inspection of the candidate's credentials establishing that he has complied with the requirements of Rules VIII and IX. The registration shall be with the clerk of the highest Appellate Court.

A candidate removing from a jurisdiction having similar standards for registration may have the registration transferred. *Nunc pro tunc* registration may be permitted, but only when the candidate had the requisite education at the date as of which he desires to be registered and he presents sufficient excuse for not having previously registered.

A candidate removing from another jurisdiction where such registration is not required may be registered *nunc pro tunc* under similar conditions.

IX. Proof of moral character shall be required as a prerequisite to registration.

X. No candidate shall be registered as a student at law until he shall have satisfied the Board that he has passed the necessary requirements for entrance to the collegiate department of the state university of the candidate's state, or of such college or colleges as may be approved by the State Board of Law Examiners, or an examination equivalent thereto conducted by the authority of the state.

XI. All applicants, after being educationally qualified, should be compelled to study law for four years, the first three of which must be spent in compulsory attendance, upon, and the successful completion of and passing the prescribed course of instruction at an approved law school which requires not less than three years of resident attendance for the completion of its course and for graduation therefrom, and then the service of a continuous year of registered clerkship, as prescribed, exclusive of all other occupations; provided, however, that the fourth year may be passed in an approved law school in post-graduate work, and that the applicant's law school course shall have included adequate courses in procedure and practice.

XII. Candidates for admission shall present themselves prepared for examination in the following subjects: Constitutional law, including the constitutions of the United States and . . . . (the candidate's state), equity, trusts and suretyship, the law

of real and personal property, evidence, decedent's estates, landlord and tenant, mortgages, contracts, partnership, corporations, crimes, torts, agency, sales, negotiable instruments, domestic relations, master and servant, common law pleading and practice, federal and state practice, conflict of laws, professional ethics, the federal statutes relating to the judiciary and to bankruptcy, and the development in . . . . (the candidate's state) of the principles of law, as exemplified by the decisions of its highest Appellate Court and by statutory enactment, and other subjects ordinarily covered in the curriculum of standard law schools.

XIII. At least 30 days before the State Board's certificate shall be issued to any candidate who shall have passed the examination, the name of each candidate should be published by the State Board in a newspaper of general circulation, and also in a law periodical, if there be one within the state jurisdiction.

XIV. A personal examination of each applicant for admission to the Bar should be had as to his moral character, such examination to be in addition to the examination as to his educational qualifications, and also in addition to the requirement of certificates as to his moral character.

XV. From the examination fees received the members of the State Board shall receive such compensation as the highest Appellate Court of the state may from time to time by order direct.

XVI. The fee for examination for admission shall be [$25.00], and passing upon registration credentials in the matter of general educational qualifications [$5.00].

XVII. The State Board shall consist of five members of the Bar, no one of whom shall receive student candidates in his office in preparation for call to the Bar, or be connected with the faculty or governing body of any law school presenting candidates for admission.

## IX.

## ORGANIZATION AND WORK OF THE BUREAU OF COMPARATIVE LAW.

The place of the former Annual Bulletin of the Bureau of Comparative Law has been taken by this JOURNAL.

The objects of the Bureau continue as heretofore. They include the translation into English of foreign laws, the preparation of bibliographies in its special field, and the consideration of foreign legislation and jurisprudence with a view to present information and materials of value to lawyers, law teachers and law students.

All members of the American Bar Association and of the Bureau of Comparative Law receive the AMERICAN BAR ASSOCIATION JOURNAL every quarter.

All members of the Association are by that fact also members of the Bureau. Any State Bar Association can become a member on payment of $15 annually, and will then be entitled to send three delegates to the annual meeting of the Bureau and to receive five copies of the AMERICAN BAR ASSOCIATION JOURNAL. Any county, city, district, or colonial Bar association, law school, law library, institution of learning or department thereof, or other organized body of a kind not above described, may become a member on payment of $6 annually, and will then be entitled to send two delegates to the annual meeting of the Bureau and to receive two copies of the JOURNAL. Any person eligible to the American Bar Association, but not a member of it, can become a member of the Bureau on payment of $3 annually, and will then receive the JOURNAL.

Distinguished foreign jurists, legislators, or scholars may be elected honorary members. They pay no fees.

The authorship of the contributions of the Bureau to the JOURNAL is indicated in each case by the initials of the writer.

HONORARY MEMBERS OF THE BUREAU.

The Rt. Hon. Viscount Bryce, of Dechmont, O. M., D. C. L., LL. D., F. R. S., of England.
Franz von Liszt, Jur. Dr., of Germany.
D. Joseph Jitta, Jur. Dr., of Holland.
Manuel Torres Campos, Jur. Dr., of Spain.
Estanislao S. Zeballos, Jur. Dr., of Argentina.

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**American Literature on Foreign Law—Luther E. Hewitt.**

All editorial communications should be addressed to the Chairman, who will see that they reach the proper editor. All books for review should also be sent to him.

## EXCHANGE LIST.

### United States.

**American Political Science Review, Baltimore, Md.**
**American Society for Judicial Settlement of International Disputes, Baltimore, Md.**
**Bureau of American Republics, Washington, D. C.**
**Case & Comment, Rochester, N. Y.**
**Central Law Journal, St. Louis, Mo.**
**Columbia Law Review, New York City.**
**Committee on Judiciary, House of Representatives, Washington, D. C.**
**Illinois Law Review, Chicago, Ill.**
**Legal Bibliography, Boston, Mass.**
**Ohio Law Bulletin, Norwalk, Ohio.**
**Patent and Trade Mark Review, New York.**
**Yale Law Journal, New Haven, Conn.**
**The Lawyer and Banker and Southern Bench and Bar Review, New Orleans, La.**
**Massachusetts Bar Association Journal, Boston, Mass.**

### Foreign.

**Institut de Droit Comparé, Brussels, Belgium.**
**Instituto Guiridico della R. Università, Torino, Italy.**
**Instituto Ibero-Americano de Derecho Positivo Comparado, Madrid, Spain.**
**The Journal of the Ministry of Justice, monthly, Petrograd, Russia.**
**Juristische Blätter, Vienna, Austria.**
**Pravo (law), weekly, Petrograd, Russia.**
**Revista de Legislación y Jurisprudencia, San Juan, P. R.**
**Revista de Legislación Universal y Jurisprudencia Española, Madrid, Spain.**
**Revista General de Legislación y Jurisprudencia, Madrid, Spain.**
**Societé de Législation Comparée, Paris, France.**

Society of Comparative Legislation, London, England.
Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre, etc., Berlin, Germany.
Ministerio de Relaciones Exteriores, Buenos Aires, Argentina.
Oficina de Canjes, Ministerio de Relaciones Exteriores, Montevideo, Uruguay.
Ministerio de Relaciones Exteriores, Santo Domingo.
Ministerio de Relaciones Exteriores, Panama.
Biblioteca Nacional, Santiago de Chile.
Urgeskrift for Retsvaesen, Copenhagen.

## STATE BAR ASSOCIATIONS AND OTHER INSTITUTIONS NOW MEMBERS OF THE BUREAU.

Pennsylvania Bar Association.
Minnesota State Bar Association.
State Bar Association of Connecticut.
Bar Association of Tennessee.
Michigan State Bar Association.
Law Association of Philadelphia.
Bar Association of the City of Boston.
University of North Dakota.
State University of Iowa.
University of Maine Law School.
Yale University Law School.
University of Pennsylvania Law School.
Department of Law, Temple University.
Law Department, University of Minnesota.
University of Chicago Law School.
Cornell University College of Law.
The Law Library of Dayton, Ohio.
Northwestern University Law School.
The Western Reserve University Law School.
Boston University Law School.
University of Missouri Law School.
Chicago Correspondence School of Law.
Harvard University Law School.
University of Illinois.
Pittsburgh Law School.
Richmond College Law School.
Wisconsin State Library.
Connecticut State Library.
Minnesota State Library.
State Law Library of Washington.
Iowa State Library, Law Department.

X.

# INDEX

FOR VOL. II (1916) AMERICAN BAR ASSOCIATION JOURNAL.

Cut along this line

1917 EDITION

DATE_____

# AMERICAN BAR ASSOCIATION

## MEMBERSHIP PROPOSALS*

**N. B. The constitution declares membership, in good standing at State Bar during the last five years, a prerequisite to election.**

| NAME OF CANDIDATE<br>Please fill names in very distinctly—typewriting preferred—and state whether title "Hon." or "Esqr." should be used. | ADDRESS IN FULL<br>Street or Building should be plainly noted when known | YEAR AND PLACE OF ADMISSION TO STATE BAR |
|---|---|---|
| | | |
| | | |
| | | |
| | | |

**Proposals should be promptly forwarded to the Vice-President for the Candidates' State, who will give the matter immediate attention.**

**See list of the Vice-Presidents on the reverse of this page.**

***I PROPOSE THE ABOVE, WHO DESIRE TO BECOME MEMBERS OF THE ASSOCIATION.***

Signature of Proposer_____

Address " " _____

* ***Members desiring to write friends who are members of the Bar offering to propose them for membership, will find suggestions as to important facts to insert in such a letter at pp. 493-494 of the July, 1916, issue of the AMERICAN BAR ASSOCIATION JOURNAL. Copies of the suggested form may be had on application to the Membership Committee; see ¶3 on reverse of this sheet.***

[OVER]

# *In re* Proposals for Membership

1. *All membership proposals* should be promptly forwarded direct to the Vice-President for the candidate's State for attention by him and the Local Council for that State. See list of Vice-Presidents below.

2. **See proposal blank on the reverse side of this page.** *It is not necessary that candidates should sign any application papers or pay dues in advance of being notified of election by the Membership Committee.*

3. Additional proposal blanks will be promptly furnished on application to the MEMBERSHIP COMMITTEE, Lucien Hugh Alexander, Esqr., Chairman, 3400 Chestnut Street, Philadelphia.

4. *It is not essential that there should be a letter of transmittal with a proposal; but should one be sent it is requested, in order that a duplicate record may be made, that* **a carbon copy** *of the letter to the Vice-President be at the same time forwarded to the MEMBERSHIP COMMITTEE, at above address.*

## VICE-PRESIDENTS AMERICAN BAR ASSOCIATION 1916-1917

| State | Name of Vice-President | Address |
|---|---|---|
| Alabama | Thos. C. McClellan | Justice Supreme Court, Montgomery. |
| Alaska | Frederick M. Brown | Judge U. S. Court, Valdez. |
| Arizona | Henry D. Ross | Chief Justice Supreme Court, Phoenix. |
| Arkansas | Samuel Frauenthal | 221 Southern Trust Bldg., Little Rock. |
| California | Isidore B. Dockweiler | 735 Van Nuys Bldg., Los Angeles. |
| Colorado | Samuel H. Kinsley | 32 Independence Bldg., Colorado Springs. |
| Connecticut | George D. Watrous | 121 Church St., New Haven. |
| Delaware | Edward G. Bradford | U. S. District Judge, Wilmington. |
| Dist. of Columbia | Josiah A. Van Orsdel | Justice Court Appeals, Washington. |
| Florida | William Hunter | 304 Zach St., Tampa. |
| Georgia | T. A. Hammond | 507 Grant Bldg., Atlanta. |
| Hawaii | A. G. M. Robertson | Chief Justice Supreme Court, Honolulu. |
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| Illinois | John T. Richards | 72 W. Adams St., Chicago. |
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| New Mexico | Thomas B. Catron | Santa Fé. |
| New York | Charles Thaddeus Terry | 100 Broadway, New York City. |
| North Carolina | Platt D. Walker | Justice Supreme Court, Raleigh. |
| North Dakota | Harrison A. Bronson | Northwestern Bldg., Grand Forks. |
| Ohio | Edward Kibler | Newark Tr. Co. Bldg., Newark. |
| Oklahoma | Samuel W. Hayes | Colcord Bldg., Oklahoma City. |
| Oregon | Richard W. Montague | Yeon Bldg., Portland. |
| Pennsylvania | S. Leslie Mestrezat | Justice Supreme Court, Uniontown. |
| Philippine Islands and China | Charles S. Lobingier | Judge U. S. Court, Shanghai, China. |
| Porto Rico | Manuel Rodriguez-Serra | San Juan. |
| Rhode Island | Thomas A. Jenckes | 916 Turks Head Bldg., Providence. |
| South Carolina | T. Moultrie Mordecai | People's Office Bldg., Charleston. |
| South Dakota | William G. Rice | Court House, Deadwood. |
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| Texas | Hiram Glass | Austin. |
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| Virginia | Lucian H. Cocke | Terry Bldg., Roanoke. |
| Washington | Benjamin S. Grosscup | Bk. California Bldg., Takoma. |
| West Virginia | John W. Davis | Department of Justice, Washington. |
| Wisconsin | William A. Hayes | Wells Bldg., Law Dept., Milwaukee. |
| Wyoming | William E. Mullen | First Nat'l Bk. Bldg., Cheyenne. |